The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

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Kentuckian Wrongly Incarcerated for 8 1/2 Years

William Gregory

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The Advocate:
Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

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FROM THE EDITOR...

Ed Monahan

Our 29th Annual Public Defender conference just finished focusing on freeing the innocent and eliminating racial discrimination. The next several issues of *The Advocate* will bring more information on these themes as we work to implement what we have learned. This issue features William Gregory, an innocent Kentuckian who was wrongly imprisoned due to junk science and racial stereotyping. His plight is frightening. He has inspired defenders statewide to resolve to not have the innocent convicted and to have the wrongly convicted freed.

We celebrate in this issue the monumental work of our DPA Award winners to improve our Kentucky criminal justice system. They have a legacy of leadership in this Commonwealth that is mindboggling.

This issue focuses on many important litigation areas from juvenile law and juror misconduct to subpoenas and plentiful caselaw.

Our annual DPA Litigation Persuasion Institute approaches. It will be held October 7-12, 2001 at the Kentucky Leadership Center. For more information or an application to attend, contact Patti Heying at (502) 564-8006 ext. 236. This week of intensive litigation practice using one of your actual cases is some of the best professional litigation development available in the nation. There are only 96 available spots for participants. There will be a waiting list. Apply early.

Over the course of the next year, *The Advocate* will be focusing on racial discrimination in our criminal justice system, including racial profiling. Please gives us your thoughts and experiences and litigation ideas to assist us in better equipping ourselves to rid the system of bias that creates unfair results.

Ed Monahan
Deputy Public Advocate

Kentuckian Wrongly Incarcerated for 8 1/2 Years Due to Junk Science and Racial Discrimination Teaches Defenders About Innocence

Businessman William Gregory, the first Kentuckian and the 74th nationally to be released as a result of exoneration by DNA evidence, taught Kentucky Public Defenders in June 2001 about representing innocent clients. Mr. Gregory was the first inmate freed solely due to mitochondrial DNA testing, which was not available in 1992 when he was sentenced to 70 years in Jefferson County for rape and attempted rape of two women based on hairs in the mask used by the perpetrator. Mr. Gregory was represented by the Innocence Project in New York by Barry Scheck with Larry Simon as local counsel.

"I am so happy to be standing here where I never thought I would be," Gregory said. Being in prison for something you didn't do was very hard. The stereotype that all black males are the same was used against me. I was devastated when this happened to me and I walked around like a Zombie in jail. This situation has made me aware of a lot of things. Gregory said racial bias was evident when his white fiancée took the stand during the trial in 1992, everybody dropped their pen, everybody stopped listening and they did not hear anything else after that.

When I went to prison, I felt all alone and I was angry because I was in a hole I couldn't get out of. But I got past that with the help of the National Innocence Project. There was hope.

Thank you, Gregory said, for having me here today. There are a lot of prisoners in prison, be patient with them, you all are their hope. Listen to them.

Larry Simon, the local counsel on behalf of the New York Innocence Project, told those present at the Conference that defense attorneys have an awesome responsibility in representing the citizen-accused. The outcome of William Gregory's case provides us with powerful motivation to bring to our practice in representing our clients. I have learned that innocent people are in prison today primarily due to jail house snitches who lie; mistaken identifications, especially cross-racial; and junk science like the hair analysis used in Mr. Gregory's case. Simon said, our job is to not let junk science into the courtroom. Make the system work for your client, he urged.

In the Spring of 2000, DPA began the Kentucky Innocence Project (KIP). William Gregory was released on July 6, 2000. Public Advocate Ernie Lewis said the creation of KIP is one of the most exciting developments in Kentucky in the last few years.

Mr. Gregory's plight is a wake up call to defenders who see little value in investigating and challenging forensic evidence in cases with clients whose defense is innocence. The Annual Kentucky Public Defender Conference this year focused on educating defenders on *Daubert* challenges to junk science, cross-examing liars, litigating unfairness due to racial discrimination, prosecutorial misconduct, and racial use of peremptories. ■

DPA Summer 2001 Law Clerks

Back row L-R: Jessie Robbins, Vickie Arrowood, Forrest Brock, David Wisdom, Clay Tharp, Jared Squires.
2nd row L-R: Kelly Menser, Jimmy Hackbarth, Tom Williams, Susan West, Joey Hodgin, Jennifer Keeney, Brian Thomas.
Front row L-R: Moriah Lloyd, Jenny Lafferty ,Lisa Cobb, Brooke Johnson.

FREEING THE INNOCENT AND CONFRONTING RACIAL DISCRIMINATION

by Judy Campbell

…..And the Winner's are ……

This year's Department of Public Advocacy award winners are celebrating a successful year, a successful career, and a lifetime of achievements! DPA has established guidelines for nominations. Some nominations are from peers, the most special kind of recommendation. Other than one's spouse or parent, no one knows your heart better or spends as much time with you than your fellow workers.

The awards themselves represent the ideals of the Department. Passion, compassion, fervor, excitement, life, liberty, and the pursuit of decency are the characteristics of the unlimited desire to serve our clients. This year's awards are bestowed on deserving people who understand they did not get to the top of the fence post by themselves, they had help. We congratulate the following persons:

Public Advocate Awards

Public Advocate Ernie W. Lewis awarded Kentucky Supreme Court **Chief Justice Joseph Lambert** a Public Advocate's Award for his work to bring about racial justice. Judge Lambert was born and raised in Kentucky, is a graduate of University of Louisville Law School, served on staff of U.S. Sen. John Sherman Cooper, and practiced law for 12 years including some criminal defense work. These experiences were significant in his success as a jurist and it is evident in each opinion he writes.

Chief Justice Joe Lambert and Public Advocate Ernie Lewis

Justice Lambert was elected to the Supreme Court in 1987 and to a 4 year term as Chief Justice in 1998. He has received many awards in his distinguished career. His alma mater awarded him their Distinguished Alumni award in 1988 and his Georgetown College alma mater awarded him with an Honorary Doctorate Degree in 1999. He received an Honorary Doctorate Degree from Eastern Kentucky University in 1999. The KBA named him as Kentucky's Outstanding Judge in 2000 and he received a Leadership Award for his work with Drug Court programs. His leadership innovations have lead him to work on not only drug courts but also Family Courts and a retired judges program, utilizing valuable judicial knowledge of retired judges.

He served on the DPA *Blue Ribbon Group*, on the United States Justice Department's 2000 Indigent Defense Symposium Kentucky team, and wrote to the state Personnel Cabinet in support of higher salaries for public defenders.

Justice Lambert has worked hard on equal access for people of color by establishing the Jefferson County Commission on Racial Fairness looking at ways to eliminate any bias. He has met with 8 universities in Kentucky and several private colleges to gather commitments toward identifying qualified minority students in their undergraduate populations and encourage them to attend law school. He established an Office of Minority Affairs at the Administrative Office of Courts. In every speech he talks about the need for all citizens to understand and have trust in the court system. "It is an honor to give a Public Advocate Award to the Chief Justice," stated Ernie Lewis.

The Chief Justice remarked he had made efforts to improve racial diversity and fairness because of Kentucky's 13,000 lawyers only 200 are African American. "It is obvious we need students in order to get lawyers and judges," he said of his efforts to recruit qualified students. Of Jefferson County's initiative, he said, "a fact that there is a far greater distrust in our institution amongst minorities needs our attention." Let's identify it and get it out in the open with an attempt to recruit more in small numbers, a grassroots effort, use retail not wholesale large numbers for law school. He concluded, "I've been on the Supreme Court for 15 years, and have seen a great many appellate attorneys and the quality of DPA's work is excellent day in and day out."

One of the most exciting programs going on in DPA for the past 2 years has been the development of the Kentucky Innocence Project (KIP). Thanks to Rebecca Diloreto, Gordon Rahn, Marguerite Thomas, and UK Law Professor **Professor Roberta Harding**, for implementing KIP. Roberta received a Public Advocate's Award for starting an innocence course at UK Law School.

Ernie Lewis and Roberta Harding

The KIP course at UK began this year with a class of 7 students. The successes have been due to a Professor who knew the criminal justice system, someone who was concerned about innocent people in prisons, and that person was Professor Harding.
Ms. Harding was educated at Harvard Law School and is currently teaching at UK School of Law. She has been a visiting professor at Georgia and Wake Forest. She teaches courses in Capital Punishment, Civil Procedure, and Prisoner's Rights and Remedies. Her jobs have included teaching all over the world, Canada, Oxford, Rome, Italy, and the University of Paris, France.

She has served as a Public Advocacy Commission Member since 1995. In May of this year she presented at Hebrew University in Jerusalem, Israel to Law and Social Work faculties on Restorative Justice. Hank Eddy, in nominating her said, "She has freely given her time and expertise to playing a leadership role in the beginning of the Kentucky Innocence Project. She created a course at UK where law students can earn graduation credits by working with our department in cases where actual innocence is the claim." Public Advocate Lewis proclaimed, "Someday an innocent man will shade his eyes as the gates open to free him and he will thank Roberta Harding."

Professor Harding thanked Marguerite Thomas and Gordon Rahn

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with whom they put in many hours of work in 2001. She thanked and recognized a KIP student, Ms. April Gatlin-Holland who was representing the 7 students, and DPA investigator Diana Queen who spent time and gave assistance to the students on how to investigate and she thanked her. She also bestowed recognition on John Palombi, Glenn McClister and Jeff Sherr for their assistance.

The **Justice Cabinet's staff, Secretary Bob Stephens, General Counsel Barbara Jones, and Kim Allen**, former Director of the Louisville Crime Commission and now Executive Director of the Kentucky Criminal Justice Council were instrumental in successful passage of important legislation on racial profiling and restoration of

Justice Cabinet's Secretary Robert Stephens and General Counsel Barbara Jones; Senator Gerald Neal, Rep. Jesse Crenshaw and Ernie Lewis (Kim Allen not present)

civil rights to convicted felons in the last session of the General Assembly. State **Senator Gerald Neal** and **Representative Jesse Crenshaw** led the legislative effort to success. They see the problems with race in America, which persists in the south including Kentucky.

The problems of race have evolved and taken on new forms: from the Poll Tax in the 50's to the problems identified by the U.S. Human Rights Commission with the most recent voting process in Florida, from lynching in the early 1/3 of the century to the disproportionate minority confinement of our children in juvenile institutions, and from discriminatory jury commissioners to prosecutors who cleverly avoid *Batson* challenges.

In a very difficult arena, this team worked effectively addressing two areas, Racial Profiling and Restoration of Civil Rights. In Kentucky, Racial Profiling was outlawed first by Executive Order and then in 2001 by the passage of SB 76. A high percentage of minority citizens have their voting rights taken away due to their felony convictions with 3.9 million Americans being disenfranchised in 1998 alone. 13% were black males. HB 281 was passed with the work of this team, making it easier for the partial restoration of civil rights of convicted felons.

Robert Stephens chaired the *Blue Ribbon Group* and is a past recipient of the Public Advocate Award for his extraordinary work as former Chief Justice and his support for indigent defense. Two of his commissioners in the Justice Cabinet are African-American, Ishmon F. Burks of the Kentucky State Police and Dr. Ralph Kelly of the Department of Juvenile Justice. Upon receiving the award and speaking for the Justice Cabinet, Secretary Stephens thanked the staff and members of the General Assembly. "Why should I have an award for doing something that is right?" Barbara Jones stated she had been thanked for doing her job.

Kim Allen, unable to be there in person, shares in this award. Her work with the BRG and the Ky. Criminal Justice Council is of immense value. She attended the Department of Justice's Symposium on Indigent Defense in Washington D.C. in 2000.

Barbara Jones, General Counsel for the Justice Cabinet since 1996, was formerly General Counsel from 1981-1996 for Corrections. She was one of the primary movers and shakers for HB 455 and together with Kim Allen they helped guide the legislation.

Sen. Neal has represented his 33rd District since 1988. In 1998 he received a Public Advocate's Award for his authorship of the Racial Justice Act. At the NLADA in San Antonio in 1998, he was awarded the Arthur Von Briessan Award. In 2001, as a member of a minority Senate, he authored and successfully guided SB 76, which outlaws racial profiling.

Rep. Crenshaw has represented the 77th District in the House since 1992. He has served on the Public Advocacy Commission and is presently professor at Kentucky State University and in private practice in Lexington, Kentucky. His untiring efforts in guiding the Restoration of Civil Rights Act through the House are the reason for this award. He publicly thanked the Kentucky Catholic conference's Jane Chiles and Father Pat Delahanty for their efforts along with Commonwealth Attorney George Moore. He related he had welcomed NAACP support. Rep. Crenshaw thanked Ernie Lewis and Ed Monahan and was very gratified for the beautiful plaque, which he will display at the entrance to his office in Lexington so visitors can say, "He must know something!"

Senator Richie Sanders

Ernie Lewis recognized **Senator Richie Sanders** from the 9th Senatorial District with a Public Advocate's Award. Senator Sanders has represented his district since 1980 and is Chair of the Senate A & R Committee and was instrumental in passing the budget in 2000. He has been a big supporter of DPA. His leadership helped establish salary increases from $21,000 to 30,000 for beginning public defender attorney salaries. He has assisted DPA in reduction of caseloads. He has been a real friend of the BRG Recommendations.

"Wow!" was Sen. Sanders' reaction. He gave immense credit to Ernie Lewis, who has ably testified before the A & R budget group.

Ernie Lewis and Senator Bob Jackson

Senator Bob Jackson, unable to be present, was awarded the Public Advocate's Award for his untiring work and support for the opening of the Murray full time public defender office. Under his leadership at Murray State University, an internship program was instituted for DPA.

Bob Spangenberg of The Spangenberg Group is a single individual who has done more for indigent defense systems across the

Bob Spangenburg and Ernie Lewis

nation than any other. He worked with the BRG as its consultant. His life's work has taken him across the country and world facilitating improved indigent defense programs, most recently in North Carolina, Kentucky, Mississippi, Texas, and China. He was presented with the Public Advocate's Award for his longtime help to Kentucky that is bearing much fruit as well as his dedicated perseverance nationally.

In his acceptance remarks he related how he has used Kentucky DPA as a model in many speeches. He stated Ernie Lewis was an outstanding leader for indigent defense. He has been a member of the Massachusetts Bar for nearly 40 years and always dreamed that change is possible. He remarked there are tremendous judges, lawyers and a new governor in Texas who want to fund DNA with $6 million, improve quality of representation and contribute funding to indigent defense. In closing he said, "Kentucky has one of the best Public Defender offices in the country and one of dedicated leadership, from the Cabinet, Legislators and the Governor." He exclaimed, "I give my Spangengberg Award for 2001 to Kentucky's Public Defenders!"

Gideon Award: Trumpeting Counsel For Kentucky's Poor

Ann Bailey-Smith, Chief Trial Attorney, Louisville-Jefferson County Public Defender Corporation, Adult Division received the *Gideon* Award, DPA's oldest award. It is presented to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the right to counsel for the poor in Kentucky.

Ernie Lewis and Ann Bailey-Smith

Ann brings 19 years of dedication to clients in Jefferson County having served in both Adult and Capital Trial Divisions as Chief Trial Attorney. She chaired the Citizens for Better Judges Committee, and received the Alumni Award from the Brandeis School of Law, amongst other endeavors and awards. She won an acquittal in *Commonwealth v. Valerie Wallace*, a Jefferson County capital case where death was sought for a woman accused of killing her husband at whose hands she had suffered years of domestic violence.

Chief Jefferson District Defender Dan Goyette remarked, "The standards that Ann sets for herself and other defenders in the representation of the indigent accused are at the highest level in terms of advocacy and professionalism. She never places her own interest or convenience before that of her clients, and is always willing to make whatever personal sacrifice is necessary to ensure the best quality of representation. She is a role model for both public and private criminal defense lawyers alike, and is recognized and respected by judges and prosecutors as an outstanding trial lawyer and worthy adversary. In short, she epitomizes all that is right and important about public defender work."

Ann thanked her husband and 4 children and said, "The Award was icing on the cake for work you dearly love and being side by side with talented folks who choose to represent the poor." With pride she gave recognition to her advisor, Dan Goyette, for his 100% encouragement. She thanked Ernie Lewis and Ed Monahan for their strength in leading improvement of representation for DPA. She suggested it was ironic that the seminar should begin on the day of McVeigh being put to death. Ann's hopes are that her sacrifices made for her hard work pay dividends with her 4 children who learned at the knee of their mother that she and her husband are parents helping those who are downtrodden.

Rosa Parks Award: For Advocacy for the Poor

Cindy Long, Investigator in the Hopkinsville DPA office received the Rosa Parks Award. This award is given to a nonattorney for dedication, service, sacrifice, and commitment to the poor and it could be said about Cindy for her work with grim and bold determination! She shows incite for human nature and is able to remain cheerful in great adversity. Her long days and weekends at work are greatly appreciated by all. She lives her life through her religion.

Ernie Lewis, Cindy Long and George Sornberger

Cindy thought her award was for her achievement of getting free cable TV for the office breakroom but Trial Division Director George Sornberger said, "During the Civil War General Stonewall Jackson was accidentally shot in the left arm by his own men at dusk on the 1st day of battle at Chancellorville. His left arm was amputated and when learning of the fate of his most reliable corps commander, General Lee is noted to have remarked, "General Jackson has lost his left arm but I have lost my right." Cindy Long has been a right arm to many.

In 1984 Cindy came aboard as a legal secretary and after 12 years went to the position of investigator. "Over 17 years I have learned what DPA stands for and it has become a very vital part of who I am!" She thanked the entire support staff who have a "*Can Do* attitude," she stated upon receiving her award. She recognized the great privilege of working with some wonderful attorneys who have taken her under her wing and trained her to be their investigator and the one she has become. She realizes she is a part of their strong defense team.

She thanked Ernie Lewis for bringing an air of respect and credibility to the agency, George Sornberger for his zeal for client representation which stirs her heart and feet into action, Tom Glover for his leadership and his working beside her and someone who works in the field not just sitting in the wagon, and her office for the nomination and their daily challenge. She gave credit to the Frankfort staff, her many family members who were present, and her God who

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teaches in His Word - That whatever my hands find to do – to do it with all my might and whose Grace, Wisdom, Mercy, and Hope I find to be sufficient for each day!

Nelson Mandela Lifetime Achievement Award

William E. "Bill" Johnson, Frankfort attorney and senior partner of Johnson, Judy, True, and Guarnieri, and a Public Advocacy Commission member received the prestigious Nelson Mandela Award. This award was established in 1997 by Public Advocate Ernie Lewis to honor an attorney for a lifetime of dedicated services and outstanding achievements. Locally known as "Big Bill" he brings his towering height and his towering presence to the courtroom and to the criminal justice system. Bob Ewald, Chair, Public Advocacy Commission from Louisville, presented the award. "He is one of the outstanding trial lawyers in the nation," Mr. Ewald said of Bill. At one point Bill received the "War Horse Award." He is a Public Advocacy Commission Member and a friend of public defender efforts in Kentucky. In private practice he selflessly gives time to colleagues and to efforts to improve Kentucky's criminal justice system. He never says no when asked for assistance. His goals are to provide the very best defense for his client, and to improve Kentucky's criminal justice system.

Ernie Lewis, Bill Johnson and Bob Ewald

Mr. Johnson related, " I never attend one of the meetings without being in the midst of the most courageous people." Bill said he practiced law in Franklin County before DPA was a statewide group and believes the Department does a remarkable job on its limited budget!

He is hopeful that life's lessons on building new prisons will be taken to heart by politicians making the laws. Putting more people in prison is a criminal injustice. With the execution of McVeigh, Bill remarked that today, June 11, 2001, is not a happy day for us. He said of all the defense attorneys, "We strive at the bar to continue to serve and change what is better for all mankind."

***In RE Gault* Award: For Juvenile Advovavy**

Gail Robinson, Juvenile Post-Disposition Branch Manager, received the *In Re Gault* Award which honors the person who has advanced the quality of representation for juveniles in Kentucky. Gail, as a Vandy student became radicalized during the Vietnam War, which led to her becoming a social worker in Louisville in her endeavor to assist the poor. She went on to law school completing her classes in 2 ½ years. Rebecca Diloreto, Director of Post Trial Division, remarked, "She is so inspirational and a springboard of innovative ideas." Gail has handled many famous cases including Todd Ice and Larry Osborne always defending the weakest among us. She is committed to her husband and children often working odd hours to be able to serve the needs of her family.

Ernie Lewis, Gail Robinson and Rebecca DiLoreto

Gail said, "My passion is being an advocate for juveniles and I really appreciate the up and coming attorneys." Gail thanked department leadership and especially Jeff Sherr for his creative education efforts for the Department.

Professionnalism & Excellence Award

Many kind words can be said of the winner of the 2001 Professionalism and Excellence Award. **Don Meier** is prepared and knowledgeable, respectful and trustworthy, supportive and collaborative. These words describe this professionalism and excellence award and the award winner, who was selected by KBA President Beverly Storm.

Ernie Lewis, Don Meier and John Stephenson

KBA Vice-President John Stephenson presented the award to the "Poster Boy" for his excellent public defender work. "Don exhibits a high quality of representation, is prepared, uses his talents, takes responsibility, and exhibits professional excellence. Don has handled every case imaginable with respect and dignity, with conscience and treated equally focusing on the needs of the client."

John related that Don commanded large crowds at his trials who pick up tips for their own practice and he is always available to mentor to young lawyers.

Don thanked Jefferson County attorneys for good things and good people who always work together well. He related that a client asked, "How long do you have to be a PD before you can be a real lawyer"? And, that sometimes judges ask PD's to be a "stand-in." Don said we are no better nor worse than our client. The image of the client will not be changed until we change ourselves. If you treat them with respect you'll get respect in return. Demand respect, and when do you become a real lawyer? When *you* decide to. Don closed, "Respect: How long do you have to be in private practice before you can be *hired* by DPA?"

Anthony Lewis Media Award

Joel Pett, Editorial Cartoonist for the Lexington *Herald Leader* won this media award for editorializing and informing on the crucial role public defenders play in providing counsel for a fair process and confidence on which the public can rely.

Deputy Public Advocate, Ed Monahan, stated there are consequences to communicating values and quoted stinging letters to the editor about Pett's cartoons. But Monahan also noted the other


Ernie Lewis, Joel Pett and Ed Monahan

consequences for Pett's work. In 1995, Joel Pett won the Global Award and 1999 won the R.F. Kennedy Journal Award followed by journalism's most prestigious award, the Pulitzer Prize, in 2000. One of Pett's cartoons depicted a courtroom scene with the judge announcing "As a Kentuckian you deserve all the defense $160 will buy … good luck!" Pett was given a personal note of congratulations from Anthony Lewis of *The New York Times*.

Mr. Pett understands and recognizes the plight of the poor for equal and adequate quality criminal defense. He also understands and recognizes the services provided by the attorneys and staff of DPA. He had a few biting thoughts for us defenders.

Relating, quite unconvincingly, that his only suit was in the repair shop, Mr. Pett said he had hoped he was dressed satisfactorily and then realized upon his arrival at the awards dinner, "I am overdressed"! He quipped, "How long do you have to be at the public defender office before you *dress* like a real lawyer." He said the real reward for our work is seeing the real people on the right side, such as cops, teachers, and yes, defense attorneys. Public defenders, like journalists are unappreciated.

Furman Capital Award

Mark Olive, an attorney in private practice in Tallahassee, Florida, and a Habeas Assistance and Training counselor for the federal administrative office received the *Furman* Award, which was created in 2000 by Public Advocate Ernie Lewis.


Ernie Lewis, Mark Olive and Ed Monahan

Mr. Olive has taught at North Carolina University Law School and was the executive director of Capital Resource Centers in Georgia, Virginia and Florida. Ed Monahan relayed that Mark had 9 cases before the Supreme Court of the United States and is constantly teaching us "How to Litigate Effectively in Capital Cases by Changing the Picture to Reveal the Humanity of the Client." "Mark stands as constant inspiration to all of us and has never said no to coming to Kentucky to teach us," stated Ed.

Mr. Olive was stunned and deeply moved that he was chosen as the second recipient of this capital litigation award. He has deep and long family connections in Kentucky including coming to Kentucky 15 years and learning from lawyers in this present group.

He was deeply moved because of the award's name for William Furman. He stated, "The Supreme Court indicated the death penalty is arbitrary, and strikes like lightening. It is fraught with discrimination."

He was also stunned because the award comes from peers and because of the many success in Kentucky in recent times. He named 8 Kentucky cases reversed in a short time. He included trial cases in the last 12 -13 months, closing 28 death penalty cases and only 3 of those got death.

Honored Guests

Representatives **Brent Yonts** and **Robin Webb**, both attended the conference as leaders in the House of Representatives and as participants and received Mr. Lewis' thanks for their continued interest and support for criminal indigent defense. **Justice Martin Johnstone** of the Kentucky Supreme Court and **Chief Judge Paul D. Gudgel**, of the Kentucky Court of Appeals, showed their continued support and interest by attending as did **Circuit Judge Mary Noble** of Fayette County.

Congratulations to the 2001 winners and to all who helped them attain their achievements! The awards have been concluded for 2001 but the thanks from Ernie Lewis and Ed Monahan and the entire staff is unending. ■

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Florida Becomes 15th State to Bar Mentally Retarded Executions

Florida governor Jeb Bush Signed a Bill Barring Executing the Retarded on June 12, 2001. Gov Bush said, "This legislation will provide much-needed protection for the mentally retarded in the judicial process." Florida becomes the 15th state, along with the federal government, to ban the execution of prisoners who are mentally retarded. The states that have banned such executions are Arizona, Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, South Dakota, Tennessee and Washington. Similar legislation is awaiting approval from governors in Connecticut, Missouri and Texas.

Important Juvenile Law Cases

Compiled by: Pete Schuler

Appeal- No direct appeal allowed from an order by the juvenile court transferring jurisdiction to the circuit court. *Buchanan v. Commonwealth*, Ky., 652 SW2d 87 (1983).

Burden of Proof- The burden of proof required to convict in juvenile delinquency cases is proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed2d 368 (1970).

Criminal Responsibility- Rebuttal presumption of no responsibility between ages of 7 and 14. *Spurlock v. Commonwealth*, Ky, 223 SW2d 910 (1949).

Criminal Responsibility- Juveniles in Virginia have no right to raise the insanity defense since they have no statutory or constitutional right. *Commonwealth v. Chatman*, Va. Sup. Ct., 538 S.E.2d 304 (2000). (www.courts.state.va.us/txtops/1992706.txt.). Reversing ct. of appeals decision at 518 S.E.2d 847 (Va.Ct.App. 1999). See also *Golden v. State*, Ark., ___SW3d____(2000), which holds similarly but states that due process requires that juveniles be competent to stand trial prior to adjudication.

Cross Examination- The Sixth Amendment's Confrontation Clause overcomes state law that renders information concerning juvenile court proceedings confidential, when said information is sought to impeach the credibility of juvenile prosecution witnesses during cross examination. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, L.Ed.2d (1974).

Death Penalty- Imposition of the death penalty on individuals for murders committed at 16 and 17 years of age does not constitute cruel and unusual punishment in violation of the Eighth Amendment. *Standford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

Detention- Procedural protections afforded to pretrial detainees by New York's Family Court Act satisfy the requirements of the Due Process Clause of the Fourteenth Amendment notwithstanding the fact that preventive detention is authorized. *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984).

Double Jeopardy- The constitutional prohibition against double jeopardy applies to juvenile court adjudications, including decisions not to try a young offender as an adult.. *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d. 346 (1975).

Dispositions- A court cannot stack consecutive time over sentencing limitations in KRS 635.060 (5). *W.E.B. v. Commonwealth*, Ky., 985 SW2d 344 (1998).

Dispositions- No juvenile detention center time, or even jail time if offender is over 18. *Jefferson County Dept. for Human Services v. Carter*, Ky., 795 SW2d 59, 61 (1990).

Due Process- The Due Process Clause of the Fourteenth Amendment requires that juvenile court delinquency hearings measure up to the essentials of due process and fair treatment. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, L.Ed.2d (1967).

Due Process-Waiver- Proceedings concerning whether a juvenile should be tried as an adult must satisfy the basic requirements of due process and fundamental fairness, as well as being in compliance with statutory provisions mandating a full investigation. *Kent v. United States*, 383 US 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

Equal Protection- Juvenile "Zero Tolerance" DUI Statute forbidding minors from driving with .02 blood alcohol does not violate equal protection, distinguishing good law in *Praete v. Commonwealth*, Ky.App., 722 S.W.2d 602 (1987) and *Commonwealth v. Raines*, Ky., 847 S.W.2d 724 (1993). *Howard and Vaughn v. Commonwealth*, 98-SC-06-TG (1998).

Experts- Right to psychologist in waiver hearing. *Garvin v. Commonwealth*, Ky.App, 88-CA-001957-MR (1990) ***unpublished***; see more generally *Binion v. Commonwealth*, Ky., 891 SW2d 383 (1995).

Felonies- Juvenile felony adjudications are not considered convictions for purposes of transfer. *Michael Davis v. Commonwealth*, Ky.App, 98-CA-002860-MR (2000) ***unpublished.***

Felonies- KRS 635.040 makes it clear that prior juvenile court "convictions" can't be used to elevate trafficking charges to second or subsequent offenses. *Herbert Forte v. Commonwealth*, Ky.App, 99-CA-002316-MR (2000) ***unpublished.***

Felonies- No distinction made between felonies, misdemeanors, and violations for purpose of providing dispositional options. *A. E. v. Commonwealth*, Ky.App, 860 S.W.2d 790, 793 (1993).

IDEA- ADHD certification constituted a change in educational placement entitling child to procedural and substantive safeguards under IDEA to thwart State's attempt to take a beyond control petition. *Morgan v. Chris L.*, 927 F.Supp. 267 (E.D.Tenn. 1994).

Jurisdiction- Juvenile Court has no power to act absent specific statutory authority given to it by the General Assembly. Any act absent such specific authority is void. *Wilson v. West*, Ky. App., 709 S.W2d 468 (1986).

Jurisdiction- District court (therefore juvenile court) is a court of limited jurisdiction. *Lee v. Porter*, Ky.App., 598 SW2d 465 (1980).

Jurisdiction- Separation of Powers- Juvenile court judges may order the Department of Juvenile Justice to pick up a committed youth within a certain period of time. The court has no power however to order DJJ to place such a child in a particular facility or to mandate specific details concerning what type of treatment to provide the child. *Commonwealth*

v. Partin, Ky.App., 702 SW2d 51 (1986).

Jury Trial- Notwithstanding the risk of loss of liberty and other punitive aspects involved in an adjudication of delinquency, alleged offenders are not entitled to have their guilt proven to a jury in juvenile court proceedings because there is an expectation that treatment will be provided to those found guilty. *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed2d 647 (1971), *Dryden v. Commonwealth*, Ky., 435 S.W.2d 457 (1968).

Right to Treatment- Treat or release from commitment. *In the Matter of L.*, 24 Or.App. 257, 546 P.2d 153 (1976).

Search and Seizure- Under ordinary circumstances, a "reasonable suspicion" that a student has or is violating the law or rules of the school will justify the search of that student by a teacher or other authority figure and satisfy the requirements of the Fourth Amendment. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

Sex Offenses- No crime if D is under 12! *Young v. Commonwealth*, 968 SW2d 670 (1998).

Sex Offenses- Right to have child sex abuse victim submit to a psychological evaluation under certain circumstances. *Mack v. Commonwealth*, Ky., 860 SW2d 275, 277 (1993).

Speedy Trial- 3 year delay too long between arrest and trial. *In re Thomas J.*, Md., 752 A.2d 699 (2000).

Status Offenses- Truancy. Not unconstitutional because "habitual truant" and "valid excuse" not defined in KRS 530.070(1)(c) for purposes of unlawful transaction charge. *Commonwealth v. Luella Hager*, Ky. App., 1999-CA-1543-DG.

Waiver- Waiver order defective where juvenile court fails to consider all statutory criteria. Circuit court has no jurisdiction where audio tape or transfer order fails to show that the Judge considered all of the factors. *Harden v. Commonwealth*, Ky.App. 885 SW2d 323, 325 (1994). See also *Richardson v. Commonwealth*, 550 SW2d 538,539 (1977).

Waiver- Juvenile Court is the gatekeeper. Circuit Court can't try a child for an offense that is different from the one that was waived by juvenile court. *Benge v. Commonwealth*, Ky., 346 SW2d 311, 312-313 (1961).

Waiver- Circuit court jurisdiction is "secondary". Jurisdiction must first attach in juvenile court, because the jurisdiction of the circuit court rests upon the proper procedure and disposition of the case in the initial court. *Heustis v. Sanders*, Ky., 320 SW2d 602, 605 (1959).

Waiver- Where waiver is invalid, there is no jurisdiction to try the child in the circuit court. *Hamilton v. Commonwealth*, Ky., 534 SW2d 802, 804 (1976).

Waiver- Statutory Changes Governing Eligibility- Defendant held not eligible for ameliorate changes in waiver criteria because the change was procedural in nature and the defendant was not entitled to retroactive application pursuant to KRS 446.110. *Dennison v. Commonwealth*, Ky.App., 767 S.W.2d 327 (1989).

Waiver of Rights- Juvenile must expressly waive rights himself. Can't be assumed by silence even though waiver of jury trial was presented to the court by counsel in defendant's presence. Adult waiver rules don't apply to juveniles. *In re R.A.B.*, Ill., 734 N.E.2d 179 (2000).

Waiver of Rights- A 15-year old, because of age, is in "the period of great instability which the crisis of adolescence produces". Special scrutiny must be utilized in determining the voluntariness of an alleged confession obtained through police interrogation. *Haley v. State of Ohio*, 332 U.S 596, 68 S.Ct. 302, L.Ed.2d (1948).

Waiver of Rights- "The law throws every reasonable protection about an infant accused of a crime and resolves every doubt in his favor". *Elmore v. Commonwealth*, Ky., 138 SW2d 956 (1940).

Youthful Offenders- KRS 635.020 (4) is constitutional. *Halsell v. Commonwealth*, Ky., 934 SW2d 552 (1996).

Youthful Offenders- Juvenile offenders who are waived under KRS 635.020 (4) are considered to be youthful offenders and are to be given all of the special protections which are afforded to other juvenile offenders who are waived to circuit court, i.e. probation eligibility for firearm offenses, final sentencing at 18th birthday, etc. *Britt v. Commonwealth*, Ky.,965 SW2d 147 (1998).

Youthful Offenders- Notwithstanding the ruling in *Britt*, youthful offenders who have been convicted of certain sexual offenses are not eligible for probation since KRS 532.045 (2) takes precedence over the leniency provisions in KRS Chapter 640. *Commonwealth v. Taylor*, Ky., 945 SW2d 420 (1997).

Youthful Offenders- 18th birthday sentencing. Must be "finally discharged" if sent back to DJJ for 6 months as one of the three statutory options. *Townsend v. Commonwealth*, Ky.App., 98-CA-001716-MR.

Youthful Offenders- no adult sentence allowed if convicted in circuit court for a lesser that child could not originally have been waived on. *Canter v. Commonwealth*, Ky., 843 SW2d 330, 331 (1992).

Youthful Offenders- youthful offenders eligible for all ameliorative sentencing procedures, including DJJ being required to do the PSI. *Stephen Jonathon Gourley v. Commonwealth*, Ky.App. 1999-CA-2335. ■

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RCr 11.42 HEARINGS

by Joe Myers and Hank Eddy

I. Introduction

RCr 11.42 provides a person that is incarcerated with a method to collaterally attack a judgment of conviction or sentence. Sometimes the Movant in a post-conviction proceeding will be able to convince the court that entered the judgment that he is entitled to have the judgment vacated or amended just based on the record as it presently stands. At other times, it will be necessary to expand upon the record by having a hearing. This article will examine the law as to when an evidentiary hearing would be appropriate upon the filing of a RCr 11.42 motion. It will also attempt to address some potential problems and issues somewhat unique to the RCr 11.42 hearing.

II. Where The Burden Lies

Naturally the burden is on the movant in a post-conviction action to show he is entitled to relief. It is a heavy burden, and the moving party must overcome the regularity of the conviction. *Wahl v. Commonwealth*, Ky., 396 S.W.2d 774 (1965), *Cert. denied* 86 S.Ct.1869 (1965). To meet the burden it must be shown that there has been a violation of a constitutional right, a lack of jurisdiction, or violation of a statute that renders the judgment void. *Fannin v. Commonwealth*, Ky., 394 S.W.2d 897 (1965). It is incumbent upon the movant to demonstrate an error of such magnitude that it is tantamount to rendering the conviction or sentence so fundamentally unfair that it amounts to a denial of due process of law. *Schooley v. Commonwealth*, Ky., 556 S.W.2d 912 (1977). The movant also has the burden to request a hearing, and present specific factual allegations to the court to demonstrate the need to present evidence. However, according to RCr 11.42(5), no hearing is required if the Commonwealth's answer can refute all the allegations from the fact of the record. Also, no hearing is required when the allegations raised, even if true, are not sufficient to invalidate the conviction. *Maye v. Commonwealth*, Ky., 721 S.W.2d 694 (1986).

III. When a RCr 11.42 Evidentiary Hearing Should be Granted

Recent court decisions have discussed the test for granting a hearing. The Court in *Harper v. Commonwealth*, Ky., 978 S.W.2d 311 (1998) ruled a hearing is required if the Commonwealth answer raised a material issue of fact that cannot be determined on the face of the record. The Court stated, "If the record refutes the claims of error, there is no need for an evidentiary hearing." *Harper* at 314. The *Harper* Court by a four to three decision held an evidentiary hearing was not required because the movant's allegations of ineffective counsel were either refuted by the record, not specifically pled, or were insufficient to entitle him to relief.

The same year that *Harper* was decided the Court of Appeals in *Osborne v. Commonwealth*, Ky. App., 992 S.W.2d 860 (1998) also examined the issue of when an evidentiary hearing is required. The Court used the same two-part test stated in *Harper*. First, the grounds raised must not be refuted by the record. Second, the grounds raised must be substantial enough if true to invalidate the conviction. The test was met in *Osborne* because it could not be determined on the face of the record if counsel was ineffective during plea bargain negotiations. Osborne alleged his counsel did not follow his instructions to enter a plea, and the record did not controvert the claim.

Two other cases decided in 1998, *Wilson v. Commonwealth*, Ky., 975 S.W.2d 901 (1998) and *Sanborn v. Commonwealth*, 976 S.W.2d 905 (1998), both announced the same principle of law as the *Harper* court did that an evidentiary hearing is not required if the issues can be resolved by looking at the record. Both defendants in *Wilson* and *Sanborn* had evidentiary hearings pursuant to RCr 11.42(5). Wilson's hearing lasted nine days. Both movant's did not prevail in their attempt to have their death sentences vacated.

RCr 11.42(5) also states that if a hearing is necessary it should be a prompt hearing. The issue of what constitutes a prompt hearing was litigated in *Hilton v. Stivers*, Ky., 385 S.W.2d 172 (1964). The movant in *Hilton* filed a writ of mandamus in the Court of Appeals asking that the trial court be compelled to rule on his case. The court granted the mandamus reasoning that RCr 11.42 motions should be expedited. The court found that a four-month delay from the filing of the motion was too long when the reason for the delay was not stated. Other cases that discuss the requirement of a prompt hearing are *Wahl v. Simpson*, Ky., 385 S.W.2d 171 (1964) and *Collier v. Conley*, Ky., 386 S.W.2d 270 (1965). Both of these cases provide that it is proper to file a writ of mandamus to compel a ruling when the delay appears to be without reason.

IV. Procedural Concern: Getting Certain Evidence To Court

A possible procedural problem in preparing for an evidentiary hearing is the court's ruling in *McQueen v. Commonwealth*, Ky., 721 S.W.2d 694 (1986) that out of state witnesses cannot be compelled to give testimony. The court held that KRS 421.250, which provides for the procuring of witnesses from other states, is not applicable to RCr 11.42 proceedings.

Another way to present the evidence of a witness, which cannot be brought before the court would be by affidavit. CR 43.12, which is applicable to the criminal rules, allows a court to accept an affidavit as evidence when a motion is

based on facts not appearing in the record. The rule also allows for evidence to be presented by depositions.

V. The RCr 11.42 Hearing And The RCr 11.42 Answer

RCr 11.42 subparagraph (4) does not require that the Commonwealth file an answer to the RCr 11.42 action. Under the respective Rules of Civil and Criminal Procedure a civil answer and an answer to an 11.42 are not governed by the same rules. See for example CR 8.02 dealing with asserting defenses and proper form of denials. CR 8.03 provides for pleading affirmative defenses, unlike RCr 11.42. Despite these differences in pleading requirements, the litigant should keep in mind RCr 13.04 which provides for utilization of the Kentucky Rules of Civil Procedure "to the extent not superseded by or inconsistent" with the Rules of Criminal Procedure.

As discussed below, counsel will likely encounter three possible situations as to the RCr 11.42 answer. Each of these scenarios warrant that the litigant preparing for an evidentiary hearing, confront certain actual and potential problems each brings. These include: 1) where an answer is not filed; 2) where an answer is filed but appears to fail to address material factual matters based on the initial RCr 11.42; and 3) an answer that is apparently fully and factually responsive to the RCr 11.42 which either demonstrates the need for an evidentiary hearing or alternatively requires some other action on the litigant's part to keep the claims alive and be brought on for a full and fair evidentiary hearing.

1. Answer Not Filed

While it is true that the Commonwealth can initially ignore the RCr 11.42, appointed counsel, after conducting a preliminary review of the case and finding potentially meritorious issues should consider using RCr 13.04 and selected Rules of Civil Procedure. The hallmark of procedural due process is notice and an opportunity to be heard appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Turst Co.*, 339 U.S. 306, 313-314, 94 L.Ed 865, 70 S.Ct. 652 (1950). Clearly, procedural due process mandates that some type of notice pleading is necessary in order to have a full and fair hearing, to avoid litigation by surprise. RCr 6.10, by analogy talks about the need for a plain and concise statement of the essential fact constituting the specific offense for which the defendant is charged in an indictment or information. Arguably, the RCr 11.42 litigant should insist she/he is entitled to use the Rules of Criminal and Civil Procedure as well as state and federal constitutional sources to achieve fairness in this regard. That the Commonwealth is not compelled to file an answer should not discourage the litigant from seeking further to determine what is the Commonwealth's legal and factual position in the matter. Arguably, any other interpretation that an inmate litigant or appointed counsel is forced to go into an 11.42 evidentiary hearing, not knowing what facts or legal positions are in dispute, is fundamentally unfair. It runs afoul of the essence of due process, notice, a full and fair hearing, and fundamental fairness. The litigant should consider utilizing Civil Rules for Discovery (Civil Rules 26-37) in the forms of interrogatories, requests for admissions, production of documents, stipulations, and depositions as needed. Again, the contention should be that while RCr 11.42 is not a civil matter, it nevertheless does not escape the mandates of due process under Section 2 of the Kentucky Constitution as well as federal due process authority through the Fourteenth Amendment.

In short, if the Commonwealth chooses not to answer and provide the notice that the movant needs for preparation of the hearing, then RCr 13.04 and the Civil Rules should be considered and where warranted, utilized to satisfy basic due process requirements.

Additionally, litigants should consider seeking discovery through other means available as in the case of exculpatory evidence. Under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995) and their progeny, the prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf including the police. Arguably, this duty is a continuing one. Counsel should determine whether trial counsel ever requested exculpatory evidence. If it was not requested, and the case suggests exculpatory evidence may exist, then a motion for exculpatory evidence should be made arguing that counsel's failure to seek this exculpatory evidence is a deficiency in performance and may constitute ineffective assistance of counsel. Since the Commonwealth is in control of this evidence, and it is necessary for the movant to raise all grounds that could be reasonably be raised in his/her initial 11.42, such relief is arguably consistent with RCR 11.42(3). Note also *Rolli v. Commonwealth*, Ky. App., 678 S.W.2d 800, 802 (1984).

Moreover, obtaining exculpatory evidence may lead to a finding of other RCr 11.42 issues such as potential prosecutorial misconduct and/or counsel's failure to adequately investigate the case. Since the Commonwealth arguably has a continuing duty under *Brady* and *Kyles*, the litigant should, at a minimum, seek any additional exculpatory evidence that was not provided to trial counsel at the time of the trial.

Finally, although it is somewhat limited, consider using KRS Chapter 61, (61.870-61.884). This may provide access to certain documents under the Kentucky Open Records Act (KORA). This may be helpful as part of the pre-hearing preparation.

2. Answer Filed: Not Addressing Material Factual Basis Of Claims

A second scenario that the litigant may face is where the Commonwealth does file an answer, but the answer may be summary in nature or very general in terms of a denial. When the litigant faces such an answer, she/he is taking a substantial risk that these general denials will later turn into specific evidence. At the hearing, the movant may be unable effectively confront or refute evidence without adequate notice.

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If this happens, a continuance or recess should be requested for adequate time to prepare a rebuttal.

To avoid this situation, the litigant should consider again utilizing the Rules of Civil Procedure through RCr 13.04. For example, under CR 12.05, the litigant may in his/her pre-hearing practice make a motion for a more definite statement. This is in conformity with RCr 13.04 and basic concepts of due process. Moreover, this may lead for the need for additional pre-hearing investigation and/or discovery such as mentioned above in the form of interrogatories, requests for admission, requests for production of documents and depositions either in person or by written questions. Again the needs of each case would dictate what, if any, or all of these would be appropriate.

In addition, an apparently less than comprehensive answer, vague and general in nature, may indicate that the Commonwealth, especially in cases alleging Ineffective Assistance of Counsel, did not confer with trial counsel in formulating the answer. Where this appears to be the case, counsel should again seek a motion for a more definite statement. Moreover, a review of trial counsel's own file is a definite resource to review for additional information. If trial counsel will likely be called as a witness, this lack of information may need to be litigated in advance. If the court knows that a witness is going to be called by the Commonwealth, or in the case of where the defendant is unable to communicate with counsel informally, then a deposition or interrogatories, or both may be warranted.

3. Answer That Is Complete

Obviously, a well-pled answer, addressing movant's factual and legal contentions, will comply with due process of law. If the answer is complete but raises new matters or raises additional facts that the litigant wishes to explore, again consider the aforementioned tools of discovery. Information provided by discovery and/or an answer may be useful, of course, for impeachment purposes at trial should inconsistencies develop or suspect claims of trial strategy are asserted.

At the evidentiary hearing if materials matters are presented beyond the scope of the answer, or any generated discovery, then the litigant should seek to keep such evidence out initially. This assumes, of course, that the evidence is prejudicial and contrary to the movant's 11.42 action. In the event that the court refuses to keep this out, counsel should consider seeking a continuance or recess if such additional time would be of benefit in the preparation and presentation of this case. In the event that the court again denies this, then the litigant, after making proper objection, should argue to the court in summation that the inconsistency, or the new, 11th hour evidence may demonstrate a lack of credibility on the part of the witness, or source of evidence.

4. Additional Matters

The benefits of preparation for the hearing utilizing discovery techniques and motion practice cannot be overstated. Uncovering additional information may necessitate seeking additional resources from the court. Again the litigant, especially if a poor person, should assert equal protection, fundamental fairness and due process in terms of seeking additional resources.

Objections to the denial of requested expert or other needed resources both before and at the evidentiary hearing should be constitutionalized. While the litigant certainly wants to prevail in the state trial court, he/she must be cognizant that relief may have to be sought in a federal habeas action. 28 U.S.C. 2254. Moreover, it is important to demonstrate to the federal court that any failure to assert or develop the factual basis of the claim(s) is not the fault of the movant. 28 U.S.C. 2254(e)(2) and (f). this may be crucial in seeking a full and fair evidentiary hearing in federal court, especially where the litigant claims the denial of same in the state court.

CONCLUSION

The RCr 11.42 litigant must keep in mind that even though the RCr 11.42 evidentiary hearing does not follow the same meticulous requirements in terms of pleading as in the civil rules, they are not immune from the basic principles of substantive and procedural due process. The opportunity to be creative exists in the form of aggressive motion practice and utilizing requests on the basis of the state and federal constitutional provisions as well as the Rules of Civil Procedure. As in any hearing, preparation is key. Understanding that the burden is on the litigant seeking relief under RCr 11.42, and what is the burden, on the particular issue, will help the litigant properly address both the factual and legal issues at hand.

In summary, a movant who wants to present evidence in a RCr 11.42 hearing that his conviction or sentence was fundamentally unfair must be able to specifically state facts that if true would entitle him to relief, and cannot be refuted by the record presently before the court. It is hoped that the information in this article will give the criminal practitioner a better understanding of how to obtain a hearing in a RCr 11.42 case. ■

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DISTRICT COURT COLUMN

The Subpoena: Its Use and Myth-Use

by Brian Scott West

Scott West

The subpoena is arguably the most important pre-trial document available to the criminal defense attorney. To win cases, you need witnesses. To secure the attendance of witnesses, you need subpoenas. While Mom, Dad, siblings, uncles, aunts, cousins and close friends – because of their close relationship with the defendant – can often be counted on to show up at trial without a subpoena, sometimes there are other witnesses who will show up only if subpoenaed, and then maybe, not even then.

It might be the *reluctant* witness, the one who does not want to get involved, or feels that he may already be involved too deep, for whom the subpoena is so important. Or maybe she is a *hostile* witness, who has information favorable to your client's case, but will not voluntarily lift the slightest finger to help him. Or maybe she is a *records custodian,* knowing nothing herself, but having possession of critical documents. Or maybe he is an *unrelated, disinterested bystander,* quite willing to testify – he just needs a valid subpoena to get an excused absence from work

In any of these events, your subpoena practice must not be sub-par; because failure to properly abide by the rules can leave your subpoena invalid, or worse, illegal. Then when your witness is a no-show at trial, you do not get a continuance, and the Sheriff is not ordered by the Court to fetch the witness. You have to proceed without the testimony.

That may be the best thing that happens. Some misuses of a subpoena might lead to disciplinary action by the Bar Association. The subpoena is, after all, an order of the court, and it should therefore be handled with care. To avoid potential professional embarrassment – or worse – the attorney must know both the proper ways to use a subpoena, but should also be aware of the myths which lead to improper usage.

Proper use of a subpoena in a criminal case begins with Rule of Criminal Procedure 7.02; but it does not end there. The defense lawyer should also be aware of Civil Rule 45 and KRS 422.300 - 330, which has particular application to subpoenaing medical records and custodians. Knowing and following these may help you avoid myth-using the subpoena in one or more of the following ways:

Myth No. 1: I can subpoena people to my office.

With the exception of subpoenas to court-ordered depositions, no, you cannot subpoena persons to places to your office or anywhere outside the courtroom. Rule 7.02(1) provides in pertinent part: "Subpoenas are issued by the clerk. It shall state the name of the court and title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein."

The rule specifically requires the title of the proceeding if there is one to be included on the form subpoena. The proceeding may be a court or jury trial, a suppression hearing, or *Daubert* hearing, or any other type of proceeding. If the proceeding does not have a title, that's okay – but the rule clearly implies that there MUST be a proceeding.

Civil Rule 45, which governs subpoenas in civil cases, is more explicit. CR 45.01 provides that "[s]ubpoenas shall not be used for any purpose except to command the attendance of the witness and production of documentary or other tangible evidence at a deposition, hearing or trial." This provision lends support to the implication of RCr 7.02. Since RCr 13.04 applies the Rules of Civil Procedure in a criminal case so long as they are not superseded by or inconsistent with the Rules of Criminal Procedure. In this instance, CR 45.01 would be interpretive, not inconsistent, with the criminal rule.

The rule against subpoenaing witnesses to places outside the courtroom applies equally to the government. Neither the Commonwealth Attorney nor the County Attorney have a superior right to subpoena persons to places outside away from the courtroom. Yet, there is an abundance of anecdotal evidence of prosecutors doing just that. This writer is personally aware of one Commonwealth Attorney being reprimanded by a Circuit Judge for subpoenaing witnesses to his office.

On a different occasion, I witnessed a hearing where the issue was whether the Commonwealth Attorney could subpoena reluctant witnesses to his office. (I do not know whether he had filed a motion asking for permission in advance, or whether he had attempted to subpoena a witness and defense attorney was objecting.) At the hearing, he implored the Court to allow him to use the subpoena for that purpose. "There has to be some way I can make them talk to me!"

The defense attorney replied "Your Honor, I have spent the

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last 25 years having doors slammed in my face by witnesses who didn't want to talk to me, and Lord willing, I'll have 25 more." (At that moment, I felt a special kinship to that defense attorney.)

I do not know how that hearing turned out — the Court took it under advisement – but the lesson to me was clear. If you want to talk to a witness and the witness will not cooperate, move for a deposition pursuant to RCr 7.10, or seek an evidentiary hearing to which you can subpoena the witness, or find another lawful way to interview the witness. Just do not subpoena him to your office.

Myth No. 2: I can subpoena documents directly to my office.

No. Technically, there is no such thing as subpoenaing documents. RCr 7.02(3) states that you may command "the *person* to whom it is directed to produce the books, papers, documents or other objects designated therein." Even though it is the documents you desire, and you could care less about whether the person shows up or not, it is the person under the order of the subpoena, not the documents. (Hence the phrase *subpoena duces tecum*, which essentially translates into "bring the documents with you.") Since it is impermissible to subpoena a person to your office for any purpose (again, other than for a court-ordered deposition), it follows that you cannot command a person to come to your office bringing documents.

The proper way to subpoena documents is to direct the custodian of records to deliver the documents to the courthouse at a hearing, or into the court file.

Myth No. 3: If I subpoena documents to the Courthouse, but the witness drops them off at my office by mistake, or out of convenience, I can go ahead and look at them and then decide if I want to go ahead and file them, or just throw them away.

If by chance or by courtesy the custodian delivers them to your office, you should follow one of two paths, depending upon the circumstance.

Prior Court Approval: If the documents are being produced after a hearing has already been held and a court order has been issued allowing you to have them and look at them without further court review, you can open the file and look at the documents. Just make sure that the documents you have been sent are the ones the Order entitles you to review. After review, you should file the contents in the court file. As to medical records, this is plainly stated in KRS 422.305 and 422.320. As to other records, RCr 7.02 authorizes the court to direct that books, papers, documents or objects be produced *before the court.* If the subpoenaed items are not placed in the court file, then they are not "before the court." Moreover, as it is information produced pursuant to a court order, and available to all parties and the court pursuant to RCr 7.02(3), throwing them away risks a destruction of evidence charge. The rule provides that the court is authorized to allow the subpoenaed objects or documents to be inspected "by the parties [plural] and their attorneys [plural]."

If it is critical that you examine your client's medical records, social security records or other documents relating to him, without incurring the obligation of having to turn them over, use a release. Then you only have to turn over those documents you intend to introduce at trial, or which you show to an expert you expect to call live at trial, and that is only if there is an obligation of reciprocal discovery.

No Prior Court Approval. If there has not been a hearing concerning the discoverability of the documents, and the Court has not otherwise ordered that you are entitled to see them, then you should not look at the documents, but should place the sealed envelope into the court file and schedule a hearing, asserting your right to look at the documents. If you look at the contents, or publish them to someone else, only to find out later that the documents were privileged and should have been revealed to you, if at all, only after an on-camera inspection, you could open yourself up to sanctions for abuse of process and place at risk your ability to use the documents in trial.

KRS 422.305 specifically governs subpoenas of medical records, and KRS 422.330 specifically provides that the psychiatrist-patient privilege is to remain intact. Hence, subpoenaing a person's mental health records and looking at them without prior court permission can subject the attorney to contempt of court or a finding of misconduct.

Other statutes preserve confidentiality or privacy interest, even while allowing the confidential or private records to be subpoenaed. One example of the risks associated with using such subpoenaed documents prior to court authorization occurred recently in the defense of a "doctor shopping" case tried by a colleague of mine. "Doctor shopping" refers to an alleged illegal attempt to obtain a prescription for a controlled substance by knowingly misrepresenting to, or withholding information from, a practitioner licensed to dispense drugs, in violation of KRS 218A.140. The "doctor shopper" theoretically goes from doctor to doctor to doctor attempting to get multiple prescriptions for the same drug in a short period of time.

To combat this practice, the Cabinet of Human Resources maintains an electronic system for monitoring controlled substances, whereby each practitioner who prescribes or dispenses drugs provides data including the name and address of the person to whom each prescription was given. The Cabinet is authorized to provide this data to any state, federal or municipal officer whose duty is to enforce the drug enforcement laws of Kentucky or the United States, and who is engaged in a bona fide specific investigation involving a designated person. KRS 218A.202. The drug enforce-

ment officer can then use the data obtained to obtain a warrant, effect an arrest, procure an indictment, or perform any other legitimate police task.

In my colleague's case, the authorities used a subpoena to obtain the compilations of data from the Cabinet's database. However, upon obtaining the data, the authorities rushed into the grand jury room, presented the results of the data, and procured indictments for doctor shopping against his client. This was a misuse of the materials and an abuse of the statute, which provides in pertinent part: "A person who receives data or any report of the system from the cabinet shall not provide it to any other person or entity except by order of a court of competent jurisdiction." Because the government had not sought a court order prior to publishing the information to a grand jury the data was suppressed as illegally obtained evidence.

The moral is, just because you got something by a subpoena, it does not mean you can use it anyway you want; other rules of privilege or confidentiality may limit the usage.

Myth No. 4: I can subpoena children to court by serving EITHER parent with a subpoena.

Not exactly. RCr 7.02(2) provides in part that "[a] subpoena for an unmarried infant shall be served upon the infant's resident guardian if there is one known to the party requesting it, or, if none, by serving either the infant's father or mother within this state or, if none, by serving the person within this state having control of the infant…" On those occasions where the parents are divorced and custody is granted to one parent, the defense lawyer must serve the subpoena on the *custodial* parent, not the non-custodial parent.

The rule specifies that either parent can be subpoenaed *only* where there is no known "resident guardian." If you serve your own client with the subpoena, and he does not have custody of the children, you will not prevail when the children do not show up and you have to prove to the court proper service of the subpoena in order to get a continuance or other remedy. Certainly, the non-custodial parent qualifies as the "resident guardian" when the child is visiting pursuant to the decree of custody; but when the child is not visiting the resident guardian will be the custodial parent. To avoid any doubt, subpoena both parents.

Myth No. 5: I actually have to place the subpoena in the witness's hand before he is bound by it.

Stories abound, many of them apocryphal, about hiding subpoenas in pizza boxes or wrapping them up in gift boxes because of the mistaken belief that you have to physically place the subpoena in someone's hand before you can claim it has been delivered. Actually, all that is required is that an attempt to deliver be made. RCr 7.02(4) provides that "service of the subpoena shall be made by delivering *or offering* to deliver a copy thereof to the person to whom it is directed."

Yelling to a person that you have a subpoena for them as they are bolting down an alley satisfies the "offering to deliver" requirement. Likewise, while there is no case law to support it, an offer to deliver a subpoena made over the telephone meets the requirement. If the offer is accepted, actual delivery of the subpoena should be attempted. But if the offer is declined, RCr 7.02 ought to be satisfied.

Myth No. 6: I have to file a copy of the subpoena before it is binding on the witness.

Until I started writing this article, I thought that was the rule. All the prosecutors with whom I have litigated file subpoenas for officers and witnesses in the courthouse as a rule. If a witness does not show for court, the judges first check the file to see if a copy of the subpoena is there before issuing a warrant for the witness or resetting the case. Notwithstanding all of this local practice, there is no authority anywhere that says the subpoena has to be filed to be binding. All that RCr 7.02(4) requires for proof of service is an affidavit endorsed upon the subpoena by the person serving the subpoena. While interests of judicial expediency would be accommodated if the copy of the subpoena were already in the file, the rule seems to allow counsel to produce proof of service from his or her own file at the time of trial, when a witness does not show.

Most of the time, especially when the witnesses are already known to the Commonwealth, counsel would want to file the subpoenas to avoid losing them, or having to make an argument why they do not have to be filed. However, sometimes there is that "surprise" witness that the Commonwealth does not know about, and filing the subpoena would threaten to spoil that surprise. In that instance, it might be best to not file the subpoena, and take your chances that if the witness is a no-show, the judge will not force you to trial for failure to file the proof of service.

Myth No. 7: I can only subpoena a witness who lives in the same county where the trial will be.

While distance from the courthouse will certainly be relevant when a judge is deciding whether a witness's attendance to trial is unduly oppressive or unreasonable, RCr 7.02(5) allows service on a witness "anywhere in the Commonwealth." Thus, a Fulton County witness can be hailed into a Boyd County Courthouse. This myth that the witness has to live in the county probably arises from Civil Rule 45.04, which states that for a deposition, a resident of the state "may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is

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fixed by an order of the court." CR 45.05, which applies to civil trials, allows a witness to be served anywhere in the state. However, his attendance at trial will not be compelled "unless he failed, when duly subpoenaed, to give his deposition." Hence, the practice has been generally to take depositions of witnesses who live far away, but subpoena live for trial those witnesses who live close to the courthouse.

Myth No. 8: If I have properly filled out a subpoena, and the witness hasn't challenged the subpoena but still doesn't show up, the Court will automatically send the Sheriff after them or give me a continuance.

No. RCr 7.02(3) does permit a custodian of records or other witness having documents to ask the court to quash a subpoena duces tecum if compliance would be "oppressive" or "unreasonable." However, a witness's failure to ask the court to quash the subpoena prior to the time of the proceeding does not relieve the subpoenaing attorney from the obligation of proving to the court that the witness or documents requested are "necessary," that is, "relevant, material and useful" (See *U.S. v. Moore*, 917 F.2d 215 (6th Cir. 1990), *cert. denied*, 499 U.S. 963, 111 S.Ct. 1590, 113 L.Ed.2d 654).

A showing that a witness is necessary is required because otherwise attorneys could manipulate the system by subpoenaing someone known to the attorney to be never available for trial, thereby continuing a case indefinitely. An extreme but true illustration of this occurred in the early 1980's, and was reported by a small newspaper in Eastern Kentucky when a lawyer attempted to have President Reagan and Vice-president Bush subpoenaed into district court in a small Kentucky town, allegedly to give relevant testimony in an alleged child abuse case. The subpoenas were quashed.

So even where a witness makes no attempt to seek judicial permission not to attend, counsel should be prepared to prove to the court's satisfaction that the subpoenaed witness had testimony that was relevant, material and useful to the defense.

Myth No. 9: If my subpoenaed witness shows up, but I decide I don't want to call him, I can just send him home.

Absolutely not. Although the issuing official is the Circuit Court Clerk (and therefore it is the Clerk's, rather than a judge's order), the subpoena is an order of the court. Once served, it can only be released upon order of the Court. The trial court retains the authority to release the witness from the command of the subpoena. Prosecutors and defense counsel alike must ask the trial court to release a witness under subpoena before telling the witness they are excused, else risking contempt of court, finding of misconduct, or worse.

This issue arose recently at a hearing in the Supreme Court. Justices Cooper and Johnstone questioned the Commonwealth's appellate lawyer about a situation where the prosecutor had released a subpoenaed witness after the first day of trial, although the Commonwealth had included the person on the list of potential witnesses it had given to the Court earlier that day. When the defense tried to call the witness, he was unavailable.

"What authority does a lawyer have to tell any witness in any trial, who's been subpoenaed, that you don't have to come to court?" the Supreme Court wanted to know.

Rather than summarize the colloquy on this question, portions have been reprinted in a sidebar to this article.

Myth No. 10: If the subpoenaed witness doesn't show up, the judge won't find the witness in contempt, so long as both sides agree there is no need for the witness.

No. Go back to the discussion of Myth No. 9. Only the trial judge can release a witness. Under RCr 7.02(7), if a subpoenaed witness does not show up and does not present an adequate excuse, the judge can punish the witness as being in contempt of court. I personally have seen judges order the Sheriff to hunt down absent witnesses, including even alleged *victims*, and escort them to the county jail to await a contempt of court show-cause proceeding. KRS 421.110 allows a court to punish a witness who intentionally disobeys a subpoena or intentionally evades service with contempt of court.

In short, do not rely upon any agreement with the Commonwealth which intrudes upon the power of the Court, especially when it involves the non-appearance at court of a material witness.

Why myths have you been guilty of following? (Don't answer that!) I'll bet at least one or two. There is absolutely no substitute for knowing the rules regarding their use, and there is little tolerance by the courts for abuse of the subpoena process. If you have a question about whether your use of a subpoena is improper, ask someone. Find out. Myth-use of a subpoena is misuse of a Court Order; when couched in those terms, it cannot be too much underscored how dangerous such myth-use can be.

Thanks goes to Bette Niemi, Capital Trial Branch Manager of DPA, and Peyton Reynolds and Barbara Carnes, of Hazard DPA Office, who contributed to this article whether they know it or not. Through the instruction of these veterans, I have been able to correct or avoid my own myth-use of subpoenas. They are the inspiration for this article.

From *Commonwealth v. Anderson,* 99-sc-000176
Oral Argument before the Kentucky Supreme Court
February 16, 2001

The following is a partial excerpt taken from the oral arguments of this case. Italicized words reflect emphasis in tone by the speaker:

Justice Cooper: Well, let me ask you this, and getting to a more basic question, what's your position on whether, or under what authority that a lawyer, whether on either side of this case, has the right to dismiss a witness who's under subpoena? What authority does a lawyer have to tell *any* witness in *any* trial, who's been subpoenaed, that you don't have to come to court?

Appellee's Counsel: Uh, I don't know what authority…I'm not being….

Justice Cooper: That's what this lawyer did, that's what the Commonwealth's Attorney did. He told this witness, "You can go to the Bahamas now. You're not going to be in this case. This guy pled guilty." Regardless of the truth or the falsity of the reason why, how does a lawyer have the authority to tell a subpoenaed witness "you don't have to show up for trial," when he's got an order here saying to appear at nine o'clock on such and such a date here?

Appellee's Counsel: I don't know how to answer that question. I will answer it in this way. I will say that, I will say that it was his witness to put on….

* * *

Justice Johnstone: I think the Appellant's position is that "It's true, we didn't subpoena [the witness], but we didn't because we knew the Commonwealth had subpoenaed [the witness]. However, we didn't know that the Commonwealth had taken it upon itself to release [the witness]." And then comes Justice Cooper's question, does his lawyer have the authority, without leave of court to release a witness that that party has subpoenaed? Or is that the court's prerogative?

Appellee's Counsel: Well I would argue that the court has the authority to release the witness, but I'm also adding….

Justice Cooper: That who does?

Appellee's Counsel: That the court.

Justice Cooper: The trial judge?

Appellee's Counsel: Yes.

Justice Cooper: Yes, I agree with that.
Appellee's Counsel: But we'll add that if this witness, Dr. _____, is so critical, defense counsel should take it upon herself to subpoena this witness.

Justice Cooper: He's already subpoenaed.

Appellee's Counsel: No, defense counsel did *not* subpoena the witness.

Justice Cooper: No, he's subpoenaed by an order signed by the Circuit Clerk….The Commonwealth's Attorney's name doesn't appear on this subpoena. It's signed by the clerk. The only thing it says here is "name of requesting attorney" and its typewritten "Commonwealth's Attorney," but there's no signature of a Commonwealth's Attorney on this subpoena…And if there was, I don't think it would make any difference because the subpoena can only be issued by a clerk.

Appellee's Counsel: Well, I, then I apologize for not answering the question. I would say that it's the trial court's job to do that. Uh, trial court's authority. ■

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Arizona Prohibits Execution Of Mentally retarded

In April 2001, Arizona Governor Jane Hull signed SB 1551, a bill banning the executions of the mentally retarded, which makes Arizona the 14th state prohibiting such executions.

KENTUCKY CASELAW REVIEW

by Shelly R. Fears

***Mills v. Commonwealth*, Ky., __ S.W.2d __ (5/24/01)**
(Not yet final)
(Reversing and Remanding for new trial)

TOPICS: Witness interview tapes played during jury deliberations, exclusion of lessor-included offense instructions, exclusion of a specific act in the complicity instruction

William Ratliff's body was discovered in the hulk of a burned truck near an abandoned mine. He died not from the fire, but from a stab wound to the neck. Shortly thereafter, Gary Mills and Melody Bowen were indicted on charges of murder, robbery, and arson. Mills was also indicted for second-degree persistent felony offender. Bowen pled guilty to lessor charges prior to trial and testified against Mills. Bowen and Mills had been dating for about two weeks before Ratliff was murdered. According to Bowen, Mills devised a plan to rob Ratliff. Bowen testified that she and Mills drove to Ratliff's house where Mills let her out. She went to Ratliff's house with a story that she was having car trouble. Ratliff offered to give her a ride back to her car in his truck. As per Mills' instructions, Bowen directed Ratliff to where Mills and the car where. After Bowen and Ratliff arrived, a fight broke out and Mills shot Ratliff. They loaded Ratliff in the back of his truck and Mills drove it to an abandoned mine with Bowen following in her car. There, Mills ordered Bowen to stab Ratliff, which she did. Mills set the truck on fire and they fled the scene.

Mills testified that he and Bowen were out drinking when they had car trouble. Bowen knew Ratliff lived nearby, so she went to see if he could help. Ratliff and Bowen came back in Ratliff's truck to jump-start the car. While the battery was recharging they all began drinking and then decided to go to a local strip mine to drink some more. While at the mine, Bowen and Ratliff got in an argument. Mills intervened and got into a fistfight with Ratliff. Bowen stabbed Ratliff while he was beating Mills.

The jury found Mills guilty of complicity to intentional murder, first-degree robbery, third-degree arson and PFO II. He was sentenced to life without the possibility of parole for twenty-five years for the murder charge, life imprisonment on the robbery charge and ten years for the arson charge.

The Supreme Court reversed and remanded for a new trial because, over defense objection, the jury was permitted to listen to tape-recorded statements of witnesses during deliberations in violation of RCr 9.74. Essentially, RCr 9.74 requires that no information be given to the jury during deliberations except in open court in the presence of the defendant, the entire jury and counsel for the parties. Here, the interview tapes in question were never played at trial in the presence of Mills and his counsel and were therefore not subject to adversarial testing. Allowing the jury to hear these tapes during deliberations was an error of "serious constitutional magnitude."

The Court found no error in the trial court's refusal to instruct on the lessor-included offenses of complicity to second-degree murder and complicity to reckless homicide because there was no evidence to support such theories. In addition, the Court found no error in the trial court's instructions that failed to set forth the specific act or acts of complicity that Mills committed. "Complicity liability often will not depend on a particular act, but on many different acts that occur at different points in time. Moreover, it may well be that it is only the accumulation of acts that serves to prove complicity."

***Kirkland v. Commonwealth and McKee v. Commonwealth*, Ky., __S.W.2d __ (5/24/01)**
(Not yet final)
(Affirmed)

TOPICS: Conflict of interest, prosecutorial misconduct, attempted robbery instruction and directed verdict, mitigation testimony

Kirkland (armed with a 9mm handgun) and McKee (unarmed) entered a liquor store intending to rob the owner. The store surveillance camera showed that as McKee ran around the counter to obtain the money, Kirkland fired a shot that struck the owner. Both Kirkland and McKee then fled the store without taking any money. The owner died from his wounds. After questioning by the police, McKee confessed and Kirkland made inconsistent statements regarding his involvement.

Kirkland testified at trial and admitted he was the shooter, but claimed the shooting was accidental. McKee did not testify. The jury found both Kirkland and McKee guilty of murder and first-degree robbery and sentenced each of them to life without the possibility of parole for 25 years on the murder charge and a concurrent sentence of 20 years on the robbery charge.

On appeal, McKee argued the trial judge committed error when she did not instruct him about the possible conflict of interest because his counsel and Kirkland's attorney were both employed by the Fayette County Legal Aid, Inc. The precise issue before the Court was "whether there is a presumption of a conflict of interest when an RCr 8.30 waiver is not executed and each defendant has his or her attorney, but these two attorneys work for the same legal aid or public defender's office." The Court held that an actual conflict of interest, as distinguished from a potential conflict, must be

shown in order to obtain relief. Overruling *Peyton v. Commonwealth*, Ky., 931 S.W.2d 451 (1996) and *Trulock v. Commonwealth*, Ky. App., 620 S.W.2d 329 (1981) (holding that noncompliance with RCr 8.30 is presumptively prejudicial and warrants reversal). Here, the Court noted that "[n]o actual conflict of interest has been claimed and no resultant prejudice has been identified."

McKee also argued that he was entitled to a mistrial for several reasons, only one of which was presented to the trial judge by contemporaneous objection (prosecutorial misconduct). The Court found no "manifest necessity" warranting a mistrial for prosecutorial misconduct. There was no evidence of any attempt by the prosecution to mislead the jury or that the jury was, in fact, mislead.

Finally, McKee argued that he was entitled to an attempted robbery instruction. The Court held that the trial judge properly refused to give an instruction on attempted robbery, as there was no evidence of any "attempt." All evidence indicated that Kirkland and McKee entered the store with a gun to steal money from the victim. The robbery was accomplished at that point.

Kirkland argued he was entitled to a directed verdict on the charges of first-degree robbery and murder. The Court held there was no error. As to the robbery charge, there was sufficient evidence to indicate that Kirkland was engaged in the act of committing a theft when he shot the victim. Whether he completed the theft or fled before it was completed is not critical. As to the murder charge, Kirkland admitted the gun was loaded when he pointed it at the owner. Whether or not he actually intended to kill the victim was a question for the jury.

The Court also found no error in the trial court's refusal to admit the testimony of a licensed clinical social worker that Kirkland could be rehabilitated in an institutional setting. The testimony was not admissible because of hearsay issues and because the witness was not qualified to give an opinion on this matter. The social worker had no experience working in corrections or with adult offenders.

Dissent: McKee was entitled to an attempted robbery instruction. Evidence of McKee's involvement in the robbery was minimal and therefore the jury could have believed he was guilty of merely an attempt to commit robbery. McKee's convictions should be reversed and remanded for a new trial

***Lawson v. Commonwealth and Brown v. Commonwealth*, Ky., __S.W.2d __ (5/24/01)**
(Not yet final)
(Affirmed)

TOPICS: Limitation of voir dire (*Shields* re-examined), directed verdict, prior bad acts evidence, statutory modifications to maximum sentence

Lawson and Brown were convicted of second-degree arson and second-degree burglary for burning the home of Jenkins and taking certain items belonging to Jenkins from the home. In addition, Lawson was convicted of first-degree persistent felony offender and Brown was convicted of second-degree persistent felony offender. Both were sentenced to a total of 80 years in prison.

On appeal, Lawson argued that the trial court improperly limited questioning during voir dire with respect to prior jury service, leniency in the criminal justice system and the full range of penalties. Ultimately, the Court found no abuse of discretion. However, with respect to voir dire questioning on the full range of penalties where a PFO charge is involved, the Court took the opportunity to re-visit *Shields v. Commonwealth*, Ky., 812 S.W.2d 152 (1991) and its progeny to establish the parameters for proper penalty range voir dire in non-capital cases. The Court noted that there is "no perfect way to define the penalty range" for a jury. "Any attempt to maximize the ability to identify those jurors capable of considering the full range of penalties by exposing them to additional sentencing information linearly increases the risk of prejudice." The Court concluded that voir dire should examine jurors' ability to consider only the penalty ranges for the individual indicted offenses without PFO enhancement. *Shields*, *McCarthy v. Commonwealth*, Ky., 867 S.W.2d 469 (1994), and *Samples v. Commonwealth*, Ky., 983 S.W.2d 151 (1998) are overruled to the extent they hold otherwise.

Both Lawson and Brown argued that the trial court erred in denying their motions for directed verdict because: (1) the Commonwealth failed to prove an essential element of second-degree arson when it failed to introduce evidence on the "issue" of whether Jenkins consented to the damage of his home; and (2) because the Commonwealth introduced no direct physical evidence showing they entered Jenkins home and started a fire. The Court found no error. Lawson and Brown did not testify at trial and their attorneys exclusively presented a "didn't do it" defense through cross-examination and closing argument. Evidence of Jenkins' outrage over the fire allowed the jury to reasonably infer that Jenkins had not given Lawson and Brown permission to damage his home. In any case, the Court noted that the trial court included the KRS 513.030(2) defense of "consent" in the instructions. Also, the Court noted that there was a substantial, if circumstantial, case against the defendants. "Circumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt."

The Court also found that there was no "palpable error" in Brown's girlfriend's testimony that Brown was "crazy" and "insane" and abused drugs. Such testimony was not so prejudicial that there was a substantial possibility that the exclusion of this testimony would have resulted in a different verdict.

The crimes with which the jury convicted Lawson and Brown occurred on June 15, 1998. On July 15, 1998, a number of

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changes to the Kentucky Penal Code became effective, including changes to the sentencing ranges in felony cases. Lawson argued that such changes were applicable to his sentencing. The Court held that, under the law at the time of the commission of the offenses, the trial court did not commit error in instructing the jury on penalties and in final sentencing. KRS 446.110 requires courts to sentence a defendant in accordance with the law that existed at the time of the commission of the offense unless the defendant specifically consents to the application of a new law which is "certainly" or "definitely" mitigating. Here, Lawson did not even raise the issue at trial, so no consent to the new laws shown. The Court did not decide if amendments to KRS 532.060 and KRS 532.080 "definitely mitigate" the penalty ranges in place at the time of the offense.

***Lewis v. Commonwealth*, Ky., __ S.W.2d __ (4/26/01)**
(Not yet final)
(Affirming)

TOPICS: Failure to hold suppression hearing, suppression of confession

Lewis was indicted for first-degree assault and resisting arrest after shooting a police officer whom responded to a 911 domestic violence call. After a jury trial, Lewis was convicted on both charges and sentenced to 20 years in prison.

Lewis violently resisted arrest. The three officers involved in his arrest had to strike his legs with a baton, wrestle him to the ground, and spray him with pepper spray in order to subdue him. After being handcuffed and read his *Miranda* rights, Lewis was escorted to a squad car for transport from the scene. While being led to the squad car, Lewis admitted in response to a direct question that he shot the police officer. As Lewis was led past the officer, who was lying wounded on the ground, Lewis spat on the ground and remarked "I hope you die, mother_____." Lewis filed a pretrial motion to suppress these statements; but, when the motion was called for a hearing, Lewis advised the court that he did not desire an evidentiary hearing because he did not want to reveal his defense strategy to the prosecutor. No evidence was introduced and the motion to suppress was summarily overruled. On appeal, Lewis argued that his statements during his arrest should have been suppressed because of his mental illness, his intoxication, and police coercion.

The Court noted that RCr 9.78 requires that the trial judge "shall conduct an evidentiary hearing … and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact …." "Rule 9.78 is premised upon the holding in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) that a defendant who moves to suppress his confession or statement on the grounds that it was involuntarily made is entitled a pretrial evidentiary hearing and a subsequent finding on the issue by either a judge or a jury different from the one determining the issue of guilt. (RCr 9.78 mandates a hearing and finding by a judge)." However, the Court noted that it does follow that the failure to hold a suppression hearing automatically results in a new trial or even a remand to for an evidentiary hearing to determine voluntariness. "To be entitled to a new hearing, a defendant must not only identify shortcomings in the procedures applied to the issue of voluntariness, but 'he must show that his version of events, if true, would require the conclusion that his confession was involuntary.'" Citing *Procunier v. Atchley*, 400 U.S. 446, 451, 91 S.Ct. 485, 488, 27 L.Ed.2d 524 (1971).

With respect to Lewis' statements, the Court found that a psychiatrist with the Kentucky Correctional Psychiatric Center examined Lewis and found him sane and competent to stand trial. Also, the Court found that there was no evidence that "panic disorder," the mental illness claimed by Lewis, would affect the voluntariness of a confession. With respect to Lewis' claim that the combination of the antidepressants Paxil and Redux caused him to be involuntarily intoxicated due to "serotonin syndrome", the Court found that there was no showing that the symptoms of "serotonin syndrome" (hyperness, nervousness, agitation, etc.) would affect the voluntariness of a confession.

As to Lewis' claim of police coercion, the Court found that the evidence indicated that the officers who subdued and arrested him used no more force than was necessary under the circumstances. Also, the Court noted that Lewis' self-incriminating statements were not made at the time he was being subjected to the physical force employed to effect his arrest. Rather, the statements were made after he was arrested and while he was being walked to the squad car for transport. Finally, the Court found that the mere fact that Lewis was handcuffed was not "coercive" and did not render his statements involuntary.

Ultimately, the Court held that the facts alleged by Lewis, even if true, would not require a conclusion that his statements were involuntary. Therefore, Lewis was not entitled to a remand for an evidentiary hearing on the issue.

Lewis' other issues were considered meritless. ■

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6th Circuit Review

by Emily Holt

Emily Holt

Nelson et al. v. Tennessee Gas Pipeline Co. et al.
243 F.3d 244 (6th Cir. 3/9/01)

This civil personal injury case is included because of the 6th Circuit's discussion of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Plaintiffs alleged that they were injured by environmental exposure to polychlorinated biphenyls (PCBs) that were being released into the air, water, and soil surrounding a natural gas pipeline pumping station owned and operated by the defendants. The trial court excluded plaintiff's medical expert testimony on the basis that it failed to meet *Daubert* standards and granted summary judgment to the defendants. Plaintiffs appealed.

Evidentiary Hearing Not Required on *Daubert* Motion

The 6th Circuit concludes that a trial court is not required to hold an evidentiary hearing on a *Daubert* motion. *Kumho*, 526 U.S. at 152.

Trial Court as "Gatekeeper" After *Kumho*: Even More Discretion

In *Daubert*, the U.S. Supreme Court held the trial judge must act as a "gatekeeper" in regard to expert scientific testimony, ensuring that such testimony or evidence is relevant and reliable. *Daubert*, 509 U.S. at 590. In *Kumho*, the Court held that this gatekeeping duty applies not just to scientific expert testimony, but to all expert witness testimony. A trial court faced with a proffer of scientific testimony must determine whether the expert "is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-593. The proponent must establish admissibility by a preponderance of proof. Id., 509 U.S. at 592, n. 10.

Several factors were identified in *Daubert* that bear on the trial court's inquiry: (1) has the theory or technique been tested or can it be tested; (2) has it been subject to peer review or publication; (3) does it have a known or potential rate of error and are there standards controlling its operation; and (4) does it enjoy general acceptance in a relevant scientific community. In *Kumho*, the Court emphasized that the factors were not exhaustive and may or may not be helpful, depending on the case. *Id*., 526 U.S. at 141. The trial court must decide which *Daubert* factors are reasonable measures of reliability in the case at hand. *Kumho*, 526 U.S. at 152.

Trial Court Can Consider Factors Outside of *Daubert*

In this case, the plaintiffs argue that the trial court erred when it considered all *Daubert* factors, at least one of which the plaintiffs did not feel was relevant, and also considered factors not mentioned in *Daubert*, including the factor that one of the medical expert's studies was funded by the plaintiffs and was conducted solely for the purpose of litigation. The Court of Appeals determines that *Kumho* only increases the trial court's gatekeeping function and discretion in determining what factors, including those listed in *Daubert* and those not listed in *Daubert*, should be considered.

Palazzolo v. Gorcyca
244 F.3d 512 (6th Cir. 3/27/01)

This case involves an in-depth analysis of Double Jeopardy implications when an appellate court concludes that a defendant is not entitled to plead guilty to a different charge than the one for which he was indicted. The 6th Circuit's holding is not favorable to defendants. Palazzolo was indicted in Michigan on one count of first-degree criminal sexual conduct ("CSC I"). Palazzolo made a motion to reduce the charge to second-degree criminal sexual conduct ("CSC II") which the trial court granted. He entered a plea of *nolo contendre* over the state's objection. The state won its appeal and, on remand, the charge of CSC I was reinstated. On federal habeas review, Palazzolo argues the state's appeal and subsequent prosecution on the CSC I charge are barred by the Double Jeopardy Clause. Specifically Palazzolo contends that the Double Jeopardy Clause is an absolute bar to the state's appeal of the final judgment entered after the *nolo contendre* plea and is also an absolute bar to the subsequent reinstatement of the CSC I charge.

Defendant's "Voluntary Choice" to Terminate Prosecution Bars Double Jeopardy Claim

The Double Jeopardy Clause of the 5th Amendment, applicable to the states through the 14th Amendment, *Benton v.*

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Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) protects (1) against a second prosecution for the same offense after conviction or acquittal and (2) against multiple punishments for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The bar against successive prosecutions however is "not absolute." In *U.S. v. Scott*, 437 U.S. 82, 101, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), the Supreme Court held that whenever a defendant takes an active role in the dismissal of the indictment, on a basis unrelated to guilt or innocence, the state is not precluded from appealing the dismissal. The Double Jeopardy Clause protects against "governmental oppression" which is not present when the defendant himself seeks to stop the proceedings.

In Palazzalo's case, he moved to reduce the charge to CSC II because of Michigan's *corpus delicti* rule which bars the state from using a defendant's confession until the state has introduced non-confession evidence of the "occurrence of a specific injury." The difference between CSC I and CSC II is that CSC I requires penetration. The victim did not testify as to penetration at the preliminary hearing but Palazzalo admitted to penetration in his confession. The 6th Circuit concludes that Palazzalo voluntarily chose to terminate prosecution of the CSC I on a basis unrelated to guilt or innocence. The Court also notes that this occurred at a preliminary stage of the proceedings, before a jury was impaneled and jeopardy attached. "It is well-settled that 'an accused must suffer jeopardy before he can suffer double jeopardy.'" *quoting Serfass v. U.S.*, 420 U.S. 377, 393, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).

Is Second Prosecution Direct and Foreseeable Result of Defendant's Actions?

Palazzalo argues that because double jeopardy attached to the CSC II charge when he was sentenced the state cannot prosecute him on the CSC I charge. The 6th Circuit rejects his reliance on *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). In *Brown*, the defendant stole a car. He was charged with joyriding and plead guilty to that offense. He was then charged with joyriding and auto theft based on the same occurrence. The Supreme Court held that the second prosecution was barred by the Double Jeopardy Clause since Brown had previously been convicted of joyriding, a lesser-included offense of auto theft. The 6th Circuit distinguished the case at bar on the basis that the state was not prosecuting Palazzalo on charges of CSC I and CSC II in "separate, successive proceedings"—they only indicted him on CSC I. "The 'second prosecution' of Petitioner was the direct and foreseeable result of Petitioner's motion to reduce the charge."

"Same Offense" Requirement for Double Jeopardy Clause to be Violated

Further the Court points out that in *Brown* the charges were greater- and lesser-included offenses, the "same offense" for Double Jeopardy analysis. Under the *Blockburger* test, *Blockburger v. U.S.*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1911), CSC I and CSC II are not the same offense since CSC I requires proof of penetration while CSC II requires proof of intent to seek sexual arousal or gratification and neither of these elements is common to the other. Thus, conviction on CSC II did not bar, for double jeopardy purposes, the reinstatement of CSC I.

Upon Conviction in Second Trial, "Cumulative Punishment" Depends on State Law

Finally, the Court notes that its holding in this case is supported by *Ohio v. Johnson*, 467 U.S. 493, 501-502, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984), where the U.S. Supreme Court held that the Double Jeopardy Clause does not prohibit a state from prosecuting a defendant who has plead guilty to some charges in an indictment on the remaining charges. The factual scenario in *Johnson* is very similar to that in the case at bar in that the defendant had plead guilty to some charges in an indictment over the state's objection. The Supreme Court noted that, upon a guilty verdict on the more serious offenses, the trial court "would have to confront the question of cumulative punishments as a matter of state law." *Johnson* at 499-500. The bottom line, the 6th Circuit concludes, is that Palazzalo was not "impliedly acquitted" of the greater charge when he chose to plead guilty, over the state's objection to a lower, but not "lesser," crime, nor was he "exposed to conviction" on the greater charge of CSC I. The state is "entitled to one full and fair opportunity to convict those who have violated its laws." *Johnson*, 467 U.S. at 502. If Palazzalo should be convicted of CSC I, the trial court should decide whether, as a matter of state law, he can be sentenced for both CSC I and CSC II.

U.S. v. Jacobs
244 F.3d 503 (6th Cir. 2/26/01 designated "unpublished decision;" 3/26/01 published)

In this case the 6th Circuit delivers a blow to the law of joinder. Elisha and Lauretta Jacobs had a rocky relationship. In December 1996, Lauretta and her six kids (two by Elisha) moved from Kentucky to Indiana to get away from Elisha. Lauretta obtained a protective order against Elisha. In January 1997, Lauretta filed criminal charges against him on the basis that he had sexually molested her daughter Loretta. In February, Elisha convinced Lauretta to come to his parents' home to get some money. He beat her and allegedly abducted her, taking her to Tennessee and eventually releasing her in Kentucky. Elisha was arrested but was released on bond in April 1997. Elisha contends that he did not ab-

duct Lauretta—that this was a consensual trip. ("Tennessee abduction")

Elisha immediately traveled to Lauretta's home in Indiana where he beat her and briefly took her hostage. She managed to escape. ("Indiana abduction") Elisha plead guilty in Indiana state court to this abduction and was sentenced to a term of 15 years. He was then charged in a federal indictment with 4 counts relating to the Tennessee abduction: (1) kidnapping; (2) interstate domestic violence; (3) use of a deadly weapon during a crime of violence; and (4) interstate violation of a protective order. The indictment also contained 3 counts relating to the Indiana abduction: (1) interstate domestic violence; (2) possession of a firearm while subject to a court order; and (3) use of a deadly or dangerous weapon during a crime of violence.

Joinder Appropriate When "Common Scheme or Plan"

Elisha moved to have the counts stemming from the Indiana abduction severed for a separate trial. The trial court overruled the motion on the basis that both the Tennessee and Indiana abductions stemmed from Lauretta's filing of criminal charges, thus were part of a common scheme or plan. Elisha's specific argument against joinder was that he would be unduly prejudiced if the jury heard about the Indiana abduction (the facts of which he generally admits) while also assessing his credibility on the facts of the Tennessee abduction (which Elisha claims was actually a consensual trip). He could either testify about both incidents, which would require him to admit guilt as to the Indiana abduction, or not testify at all, which would mean that he could tell his side of the story about the Tennessee abduction. The 6th Circuit acknowledges that this argument has merit, but concludes that there is no error because a common scheme was, as the district court had also concluded, at the heart of the plan—Elisha committed both abductions in an attempt to convince Lauretta to drop the criminal charges against him. The two abductions are thus factually intertwined. Because of the common scheme or plan, evidence regarding the other crime would have been admissible in separate trial. For a different result, see *Cross v. U.S.*, 335 F.2d 987 (D.C. Cir. 1964). Further "cautionary instructions" telling the jury to consider the evidence relating to each abduction separately were given. It would seem from the Court's opinion that a "common scheme or plan" could be found in almost any case.

Prosecutor's Arguing of Facts Not in Evidence Appropriate When Defense Counsel "Opens the Door"

The Court also addresses Jacobs' prosecutorial misconduct argument that centers on the prosecutor's rebuttal argument that made reference to facts not in evidence. In defense counsel's attempt to prove that the Tennessee incident was not really an abduction, he argued in closing argument that during the Tennessee abduction Elisha left Lauretta in the truck with a shotgun and she never tried to escape. In rebuttal argument, the prosecutor argued that Jacobs' probably took the shells of the shotgun so that it would have been no more use to Lauretta than a "stick." The Court concludes that the prosecutor's argument was not error because the defense "opened the door" by suggesting that Lauretta was left alone with a loaded shotgun when that itself was not established by the evidence. Thus, the prosecutor's "alternative scenario" was a "legitimate response to the defense's speculative closing argument."

Sims v. U.S.
244 F.3d 509 (6th Cir. 3/23/01)

Order Denying Certificate of Appealability is Nonappealable

In this very brief opinion, the 6th Circuit holds that an order denying a certificate of appealability from a district court judgment is nonappealable.

U.S. v. Smith
245 F.3d 538 (6th Cir. 3/27/01)

Smith plead guilty to conspiracy to possess with the intent to distribute cocaine base and cocaine. At his sentencing hearing a contested issue was whether Smith was responsible for the sale of 5.5 grams of cocaine as such a finding would double his term of imprisonment. To the end of proving that he was not responsible for that transaction, Smith called co-defendant George Carter who asserted his 5th Amendment right not to testify. Smith objected, arguing that Carter should not be allowed to assert his 5th Amendment privilege since he had already plead guilty to the charges resulting from his role in the conspiracy and had made numerous statements to the police. Carter argued that he had never made statements regarding the issue on which Smith wished him to testify and he would be exposing himself to perjury and obstruction of justice charges should he be compelled to testify. At the sentencing hearing, Carter did briefly testify about his plea agreement with the government, but asserted his 5th Amendment right when asked about the sale of the 5.5 grams of cocaine.

Defendant Who Has Been Convicted But Not Sentenced Retains 5th Amendment Privilege Against Self-Incrimination

In *Mitchell v. U.S.*, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), the U.S. Supreme Court held a defendant who has been convicted but not yet sentenced retains the privilege against self-incrimination at her sentencing hearing. "Where a sentence has yet to be imposed, however, this Court has already rejected the proposition that 'incrimination is complete once guilt has been adjudicated.'" *quoting*

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Estelle v. Smith, 451 U.S. 454, 462, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

Defendant Who Has Been Sentenced Retains 5th Amendment Right to not Incriminate Himself in Other Offenses

Carter had already been sentenced, unlike the defendant in Mitchell. Nevertheless the Court concludes that he rightfully invoked his privilege based on its holding in *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1076 (6th Cir. 1990): "although a defendant pleading guilty to an offense waives the constitutional privilege with regard to the offense admitted, he does not thereby submit 'a blanket waiver as to other offenses the might form the basis of later charges.'" *quoting U.S. v. Seavers*, 472 F.2d 607, 611 (6th Cir. 1973).

The Court ultimately concludes that Carter's testimony regarding the sale of 5.5 grams of cocaine to which he had already plead guilty potentially subjected Carter to perjury or obstruction of justice charges since the testimony would be of a self-incriminating nature. Thus, no error occurred when the trial court allowed Carter to invoke his 5th Amendment privilege.

U.S. v. Vartanian
245 F.3d 609 (6th Cir. 3/30/01)

Vartanian made threats to several real estate agents after they facilitated a sale of a home in his neighborhood to an African-American family. Ernest and Kemlyn Stringer, the buyers, and their real estate agent, Steven Weiss, won a civil suit based on violations of Michigan's Elliott-Larsen Civil Rights Act. Subsequently Vartanian was indicted by a federal grand jury on criminal charges: one count of using "force and threat of force. . . [to] intimidate [the real estate agents]" and a second count of "intimidating and interfering with an African-American family with regard to their opportunity to. . . purchase" a home by "force and threat of force" against real estate agents.

Prior Testimony of Unavailable Witness: Examine Motives of Civil Versus Criminal Attorneys

Weiss died between the end of the civil suit and the criminal trial. Vartanian objected to the use of parts of Weiss' testimony at the civil trial in the criminal trial. FRE 804(b)(1), like KRE 804(b)(1), allows the use of prior testimony of an unavailable witness "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." The same language is used in KRE 804(b)(1).

Vartanian's specific objection is that his criminal attorneys and the civil attorneys had different motives to develop the testimony. At the civil trial, the goal was to establish that no threats were made against Weiss or Stringers because all of Vartanian's statements were made to Kathy and Mike Martin, the seller's agents, who had not filed civil claims. At the criminal trial, the second count directly alleged "threats of force" against Weiss and the Martins. Thus, his stipulations at the civil trial would actually help the government prove its case at the criminal trial.

The Court acknowledges that there is some merit to Vartanian's argument but that because the government did not include that part of the testimony in its case at the criminal trial no error occurred. "The government read to the jury only the portions of Weiss' direct testimony that recounted the agents' confrontation with Vartanian and Weiss' subsequent reactions." The only portion of cross-examination read at the criminal trial "consisted entirely of Weiss' agreement that Vartanian never mentioned the Stringers directly during his tirade." Thus, it would seem that the a challenge to the admission of prior testimony on the basis of divergent motives at civil versus criminal trials is appropriate under the right circumstances.

Searcy v. Carter
246 F.3d 515 (6th Cir. 4/5/01)

Denial of Motion for Delayed Appeal Does Not "Retrigger" AEDPA One-Year Statute of Limitations

In 1994 Searcy was convicted in Ohio state court of robbery. He lost his direct appeal to the Ohio Court of Appeals and failed to timely file an application for review with the Ohio Supreme Court. Instead he opted to pursue state post-conviction relief. Three years after his direct appeal was final Searcy filed a motion for delayed review to the Ohio Supreme Court. This motion was denied. He then filed a petition for writ of habeas corpus that was denied by the district court because it was untimely. He appealed, and the 6th Circuit concludes that denial of a motion for a delayed appeal does not "retrigger" the one-year statute of limitations for filing federal habeas petitions under the AEDPA.

Searcy's argument is that in Ohio a motion for delayed appeal is considered to be part of the direct appeal process within the meaning of 28 U.S.C. § 2244(d)(1)(A) in that a motion to file a delayed direct appeal is authorized in felony cases. The 6th Circuit notes recent Ohio case law which held the running of the statute of limitations for filing petitions for state post-conviction relief could not be "indefinitely delayed" until a delayed appeal is filed.

The 6th Circuit ultimately holds that the AEDPA one-year statute of limitations is not "retriggered" by the denial of a delayed direct appeal motion although the filing of such a motion can toll the running of the statute of limitations. The Court's rationale is that to hold otherwise would "effectively

eliminate" the statute of limitations.

U.S. v. Harper
246 F.3d 520 (6th Cir. 4/6/01)

Apprendi Not Violated When Defendant Stipulates to Element Enhancing Sentence

Harper plead guilty in federal district court to conspiracy to distribute and possess with intent to distribute marijuana. As support of the plea agreement, Harper stipulated that he assumed responsibility for 1,108 pounds of marijuana. He was sentenced to a term of 168 months in prison, a lengthier term than he was apparently expecting. On direct appeal, he argues that his sentence is unconstitutional under *Apprendi v. N*.J., 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because the amount of the drugs for which he was sentenced was not proven beyond a reasonable doubt.

The 6th Circuit rejects Harper's Apprendi challenge based upon the facts of this specific case. First, the Court notes that since the indictment did not allege a specific quantity of drugs, if Harper had not stipulated to a specific amount, and if the judge had found the amount by a preponderance of the evidence, Apprendi would be violated. Second, the Court concludes that if Harper had been indicted for a unknown amount of marijuana and had been convicted by the jury for this unknown amount, but was sentenced under a preponderance of the evidence standard by the judge in excess of the statutory maximum, Apprendi would also be implicated. Because Harper stipulated to the amount of marijuana and because the trial court sentenced Harper within the statutory guidelines based on the stipulation in the plea agreement, Apprendi is not violated by this factual scenario.

U.S. v. Denton
246 F.3d 784 (6th Cir. 4/13/01)

Denton was convicted of kidnapping and use of a firearm during a crime of violence. He kidnapped a check-cashing employee, Georgia Forchia, from a hotel and took her to the check-cashing store to rob the safe. The employee was able to contact police and Denton was arrested at the scene.

Suppression of Confession: Was Will of Defendant Overcome by Police Coercion?

Denton made statements to police at the time of his arrest and later that same day during a videotaped interrogation. He moved to suppress these statements, and the district court overruled the motion. Denton alleges that officers beat him when he was arrested and that this coercion rendered his inculpatory statements to the officers at that time inadmissible. Further, Denton argues that the government has failed to prove that the "coercive environment" had dissipated by the time he made his videotaped confession. The district court held that Denton fabricated the story about the beating to explain why he lied to the officers at the time of his arrest. On direct appeal, the 6th Circuit examined the record to determine if there was credible proof that Denton's "will was overborne by coercive police activity, thereby making his statements involuntary." In U.S. v. Rigsby, 943 F.2d 631, 635 (6th Cir. 1991), the Court held that for a confession to be coerced, "the evidence must establish that: (1) the police action was objectively coercive; (2) the coercion in question is sufficient to overbear the defendant's will; and, (3) the defendant's will was, in fact, overborne as a result of the coercive police activity."

The 6th Circuit determines there is no credible proof that Denton's confessions were coerced. First, as to the statements made at the time of arrest, it is only Denton's word that officers mistreated him. The district court expressly found that Denton's testimony was not credible. As to the videotaped confession, Denton signed a form waiving his rights before the interview began. Denton himself said in the interrogation that he appreciated Lt. Allen's respectful manner towards him. Finally, Lt. Allen testified that Denton was calm and relaxed during the interview. The Court finds that the videotaped confession was also not coerced.

Prior Consistent Statements Always Admissible to Rehabilitate Witness

At trial Forchia testified that she gave three written statements to police officers. Defense counsel attempted to point out various inconsistencies between the statements by having Forchia read answers to specific questions. Counsel did not allow her to explain her answers or read answers to other questions. On redirect, the prosecution attempted to introduce all of her written statements as prior consistent statements under FRE 801. [In Kentucky, this is KRE 801A(a)(2).] The trial court would not allow those statements to come under that exception. The trial court did allow, however, Forchia to read into the record all three statements after the close of the Commonwealth's case-in-chief. The court cautioned the jury to only consider the testimony for impeachment purposes and not as substantive evidence. The 6th Circuit holds that this was not error. It points out that a court has greater discretion in allowing prior consistent statements for impeachment purposes than as substantive evidence under the Rules of Evidence. The Court quotes extensively from another 6th Circuit case, Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 730 (6th Cir. 1994): "The use of prior consistent statements for rehabilitation is particularly appropriate where, as here, those statements are part of a report or interview containing inconsistent statements which have been used prior to impeach the credibility of the witness. . . This rehabilitative use of prior consistent statements is also in accord with the principle of completeness promoted by Rule 106." [Kentucky also has a rule of completeness in KRE 106.]

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U.S. v. Kimes
246 F.3d 800 (6th Cir. 4/13/01)

At issue in this case is whether assaulting a federal officer is a specific intent crime or a general intent crime. The 6th Circuit joins the majority of circuits in concluding that it is a general intent crime; thus diminished mental capacity is not a defense. While this case obviously involves an interpretation of federal law, it provides useful analysis of general intent versus specific intent crimes and the defense of diminished capacity.

Mr. Kimes is a Vietnam vet who was being treated for depression and post-traumatic stress disorder at a V.A. Medical Center in Tennessee. He made a "verbal safety contract" with his therapist promising that if he felt that he was about to hurt himself or others that he would either call her or report to the V.A. Medical Center emergency room immediately. He began to live in his truck in the V.A. parking lot. One day, two V.A. police officers approached his vehicle, asking Kimes what he was doing and if he needed assistance. Kimes immediately asked to be taken the E.R. However, when one of the officers approached him, he began to act violently and an altercation. Kimes attempted to take one of the officer's guns out of the holster but was finally subdued and taken to the V.A. police station. At the station Kimes asked an officer to return to the parking lot to secure his vehicle; the police began a full-blown search of the vehicle, uncovering 2 knives.

Kimes was eventually indicted for assault on federal officers and possession of knives on V.A. property. As a defense, he sought to introduce medical evidence regarding his mental therapy; his experts were going to testify that when one of the officers touched him he experienced a "hyper-startled reaction" and this he could not control his actions. Thus, Kimes could not have the necessary mens rea. The trial court excluded the testimony on the grounds that assault on a federal officer is a general intent crime. Kimes was forced to use a self-defense claim and was convicted of both crimes.

Diminished Capacity Is Defense Only to Specific Intent Crimes

Diminished capacity is only a defense to specific intent crimes. U.S. v. Gonyea, 140 F.3d 649, 651 (1998). Diminished capacity defense applies "where the defendant claims only that his mental condition is such that he or she cannot attain the culpable state of mind required by the definition of the crime." U.S. v. Fazzini, 871 F.2d 635, 641 (7th Cir.), cert. denied 493 U.S. 982, 110 S.Ct. 517, 107 L.Ed.2d 518 (1989). Under this theory the defendant only must "cast a reasonable doubt on the government's proof that Mr. Kimes had the necessary mens rea."

Assault on Federal Officer is General Intent Crime

In a specific intent crime, the defendant must "act with the purpose of violating the law." In a general intent crime, the defendant must only "intend to do the act that the law proscribes." Gonyea at 653. There is a split in the circuits as to whether assault on a federal officer is a general or specific intent crime. The majority (7th, D.C., 8th, 9th) of the circuits have determined that it is a general crime based on (1) Congress' failure to include a specific intent requirement as it has done in most specific intent crimes and (2) the overall purpose of the crime to protect federal officers. The 6th Circuit joins the majority of circuits in holding that assault on a federal officer is a general intent crime; thus Kimes cannot use the diminished capacity defense.

Strong Dissent by Judge Merritt

Judge Merritt dissents from this holding, noting that at common law assault and battery required "a form of guilty knowledge—whether we call it scienter, malice, specific intent, or give it some other label." Further he notes that certain exceptional circumstances will arise in which it is ridiculous to find commission of assault on a federal officer but such a finding will now be required. For example, a state police officer who "assaults" a federal officer resisting arrest will be guilty of this crime as will a citizen who "assaults" a federal officer unlawfully breaking into her home. Under the majority's holding today, assault on a federal officer is now essentially a strict liability crime. ■

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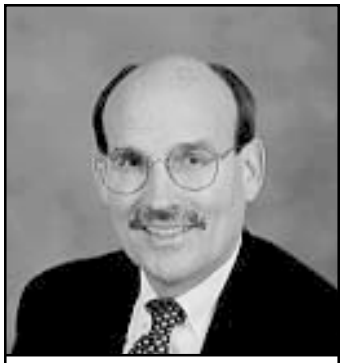
Another Country Abolishes Death Penalty

Chile's President Ricardo Lagos signed a law abolishing the death penalty except in times of war.

PLAIN VIEW . . .

by Ernie Lewis, Public Advocate



Ernie Lewis, Public Advocate

Atwater et al. v. City of Lago Vista et al.
121 S. Ct. 1536; 149 L. Ed. 2d 549; ___ U.S. ___
(April 24, 2001)

"In several recent cases the Supreme Court has declared that the principal criterion for assessing whether searches and seizures are 'unreasonable' within the meaning of the Constitution is whether they were allowed by eighteenth-century common law. This new form of Fourth Amendment originalism breaks dramatically not only with the a historic approach of the Warren and Burger Courts to search-and-seizure questions, but also with an older tradition of using the background of the Fourth Amendment to illuminate not its precise demands but its general aims. This Article traces the emergence of the new Fourth Amendment originalism and argues that the doctrine has little to recommend it. The Court's revised understanding of the Fourth Amendment is faithful neither to the text of the Amendment nor to what we know of its intent. And anchoring the Fourth Amendment in common law will do little to make it more principled or predictable, in part because common-law limits on searches and seizures were thinner, vaguer, and far more varied than the Court seems to suppose. What the common law has of value to offer Fourth Amendment law is what it has to offer constitutional law more generally: not its rules but its method." David A. Slansky, "The Fourth Amendment and Common Law", 100 *Col. L. R.* 1739 (2000).

"In evaluating the scope of [the Fourth Amendment], we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, 115 S. Ct. 1914, 1916; 131 L.Ed. 2d 976, 980; 514 U.S. 927, 931 (1995).

The Court had an opportunity to continue its flirtation with the applicability of the common law to its interpretation of the Fourth Amendment in the widely criticized case of *Atwater v. City of Lago Vista*. The Court framed the question and gave the succinct holding thusly: "The question is whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. We hold that it does not."

The case arose out of Texas, where it is unlawful not to wear a seatbelt, and where a small child must be belted in the front seat. Police officers may "arrest without warrant a person found committing a violation" of the seatbelt laws, despite the fact that the offense does not carry jail time.

In March of 1997, Gail Atwater, her 3-year-old son and her 5-year-old daughter were in the front seat of her pickup truck driving down the street of Lago Vista, Texas. None of them were wearing seatbelts. An officer saw her and pulled her over. After some words between Atwater and the officer, who had previously attempted unsuccessfully to arrest her for the same charge, she was denied her request to take her children to the house of a friend who lived nearby. The friend appeared during the arrest and took the children. Atwater was handcuffed, put into the police car, and taken to the police station where she was booked. After an hour in a cell by herself, she was taken before a magistrate and released on bond. Eventually, she pled no contest to the seatbelt offense and fined $50.

The matter did not end there. Atwater filed a Section 1983 action in state court alleging that her Fourth Amendment rights had been violated by the arrest. After the City removed the case to federal court, the suit was dismissed on summary judgment. A panel of the Fifth Circuit reversed, holding that the arrest for a seat belt offense had been unreasonable. The *en banc* Fifth Circuit reversed the panel decision, holding under *Whren v. United States*, 116 S.Ct. 1769; 135 L.Ed. 2d 89; 517 U.S. 806 (1996), that because the officer had probable cause to arrest for a misdemeanor offense, the arrest was reasonable. The US Supreme Court granted *certiorari*.

Justice Souter wrote the opinion for a Court split 5-4, affirming the Fifth Circuit. The Court first addressed Atwater's claims under common law that officers could not make warrantless arrests unless there was a breach of the peace. Atwater relied upon *Carroll v. United States*, 45 S.Ct. 280; 69 L.Ed 543; 267 U.S. 132 (1925), where the Court had stated that in misdemeanor cases, "a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence."

The Court rejected this common law argument, finding the historical evidence unclear. "We thus find disagreement, not unanimity, among both the common-law jurists and the text writers who sought to pull the cases together and summarize accepted practice."

The Court also found that Parliament had written statutes

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around the time of the founding of the Republic that had allowed for the arrests of misdemeanants without reference to a breach of the peace.

Nor was the Court convinced that the law as it developed in this country was consistent with Atwater's argument. "During the period leading up to and surrounding the framing of the Bill of Rights, colonial and state legislatures…regularly authorized local peace officers to make warrantless misdemeanor arrests without conditioning statutory authority on breach of the peace." Nor did the Court find support for Atwater's argument in the law as it developed in this country after the framing of the Constitution. "The story, on the contrary, is of two centuries of uninterrupted (and largely unchallenged) state and federal practice permitting warrantless arrests for misdemeanors not amounting to or involving breach of the peace."

Once the common law was dispatched, the Court turned to Atwater's claim that the seizure had been unreasonable. "Atwater accordingly argues for a modern arrest rule, one not necessarily requiring violent breach of the peace, but nonetheless forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention." It was at this point that the Court avoided the balancing test and relied more on the reasoning in *Whren*. "[W]e confirm today what our prior cases have intimated: the standard of probable cause 'applie[s] to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.' *Dunaway v. New York*, 99 S.Ct. 2248, 2254; 60 L.Ed. 824, 833; 442 U.S. 200, 208 (1979). If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."

While impressed with what Atwater had gone through during the arrest, the Court did not find those facts dispositive. "Atwater's arrest was surely 'humiliating,' … but it was no more 'harmful to…privacy or…physical interests' than the normal custodial arrest. She was handcuffed, placed in a squad car, and taken to the local police station, where officers asked her to remove her hoses, jewelry, and glasses, and to empty her pockets. They then took her photograph and placed her in a cell, alone, for about an hour, after which she was taken before a magistrate, and released on $310 bond. The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment."

The Court was comforted by the fact that Atwater was taken before a magistrate to be released on bond shortly after her arrest, within an hour, citing *County of Riverside v. McLaughlin*, 111 S.Ct. 1661; 114 L.Ed. 2d 49; 500 U.S. 44 (1991). Perhaps that is typical in Texas, although recently told tales of defendants languishing in jails for 6 months without a public defender being appointed would tend to make one think otherwise. Be that as it may, reader should note that in many places in Kentucky, one is not taken before a magistrate if arrested on a Friday night, for example, for several days. An arrest for such an offense on the Wednesday before Thanksgiving could result in jailing without an appearance before a magistrate for up to 5 days, presumably for an offense that carries no jail time.

Justice O'Connor wrote the dissent, joined by Justices Stevens, Ginsburg, and Breyer. The dissenters agreed that the common law interpretation of the majority was correct. However, the dissenters would have relied more extensively upon the reasonableness inquiry, utilizing the familiar balancing test. "While probable cause is surely a necessary condition for warrantless arrests for fine-only offenses…any realistic assessment of the interests implicated by such arrests demonstrates that probable cause alone is not a sufficient condition."

The dissent would not construct a blanket prohibition of custodial arrests for fine-only misdemeanors. Rather, they would "require that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion' of a full custodial arrest."

Using this test, the dissenters would have found Atwater's arrest a Fourth Amendment violation. "Ms. Atwater's arrest was constitutionally unreasonable…The officer's actions cannot sensibly be viewed as a permissible means of balancing Atwater's Fourth Amendment interests with the State's own legitimate interests. There is no question that Officer Turek's actions severely infringed Atwater's liberty and privacy. Turek was loud and accusatory from the moment he approached Atwater's car. Atwater's young children were terrified and hysterical. Yet when Atwater asked Turek to lower his voice because he was scaring the children, he responded by jabbing his finger in Atwater's face and saying, 'You're going to jail.'"

The dissenters also looked at the implications of the majority's holding. "The *per se* rule that the Court creates has potentially serious consequences for the everyday lives of Americans. A broad range of conduct falls into the category of fine-only misdemeanors…Under today's holding, when a police officer has probable cause to believe that a fine-only misdemeanor offense has occurred, that officer may stop the suspect, issue a citation, and let the person continue on her way…Or, if a traffic violation, the officer may stop the car, arrest the driver…search the driver…search the entire passenger compartment of the car including any purse or package inside…and impound the car and inventory all of its contents…Although the Fourth Amendment requires that the latter course be a reasonable and propor-

tional response to the circumstances of the offense, the majority gives officers unfettered discretion to choose that course without articulating a single reason why such action is appropriate. Such unbounded discretion carries with it grave potential for abuse…[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop…But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers' poststop actions—which are properly within our reach—comport with the Fourth Amendment's guarantee of reasonableness."

McCurdy v. Montgomery County, Ohio, et al.
240 F.3d 512 (6th Cir.),
(February 16, 2001);
Rehearing Denied; 2001 U.S. App. LEXIS 9236
(April 24, 2001)

This is a Section 1983 case in which McCurdy was arrested for disorderly conduct when he, an African-American man, was standing in front of his house at 5:00 in the morning talking with his son and two friends following a graduation party. An officer stopped and asked them "what's up, gentlemen?" McCurdy asked the officer, "what's the problem?" or "can I help you?" The officer parked his car and asked McCurdy to repeat what he had said. McCurdy asked "what the fuck do you want?" The discussion escalated, resulting in McCurdy's arrest for disorderly conduct, defined as follows in Ohio: "No person, while voluntarily intoxicated, shall…[e]ngage in conduct or create a condition that presents a risk of physical harm to the offender or another, or to the property of another." The jury found for the officer and the County, after which McCurdy filed a motion for judgment notwithstanding the verdict. McCurdy appealed the denial of the motion to the Sixth Circuit.

Judge Nathaniel Jones was joined by Judge Cole in reversing the district court. While the Court agreed that McCurdy could have been found to have been intoxicated, the Court also found that "no reasonable jury could conclude that Officer Cole had probable cause to believe that McCurdy presented a risk of physical harm either to himself, others, or the property of others." "When an officer literally has no idea whether a presumptively law-abiding citizen has violated the law, the Fourth Amendment clearly commands that government let the individual be. Indeed, if anything is clear about the Fourth Amendment, it is this: government may deprive its citizens of liberty when, and only when, it has a viable claim that an individual has committed a crime, and that claim is supported empirically by concrete and identifiable facts."

Judge Engel dissented. He believed that there was "objective and credible facts from which a reasonable police officer could find probable cause to believe that McCurdy presented a risk of physical harm under the statute cited."

United States v. Taylor
248 F. 3d 506 (6th cir.)
(April 24, 2001)

Officers with the Kalamazoo Valley Enforcement Team were investigating the claim that Joseph Taylor was a drug dealer, an illegal weapon seller, a member of a militia, and perhaps a participant in several murders. Notwithstanding not having probable cause, they went to his apartment "to ask him a few questions." "Not wanting to warn Mr. Taylor of their presence," (odd, if their purpose was that of asking him questions), they convinced other tenants of the apartment building to let them into the apartment building. They went to Taylor's apartment and knocked. They heard "shuffling" inside, and requests for delay. Eventually the person answering the door, who turned out to be Taylor's brother (Hill), opened the door and allowed the officers to come inside. Once inside a "narrow entranceway" the officers again asked if they could go into the more spacious living room, and they were allowed there. Once in the living room they saw a marijuana stem. The officers told Hill they were going for a warrant and before going would "secur[e] the premises." Hill told them there were no drugs or other people in the apartment; the officers told Hill they were going to conduct a protective sweep of the apartment. That sweep uncovered Taylor and a duffel bag full of marijuana baggies. A warrant was obtained, the evidence was seized, and after losing a motion to suppress, Taylor was convicted in US district court and appealed to the Sixth Circuit Court of Appeals.

Judges Krupansky, Batchelder, and Gilman unanimously affirmed the findings of the district court. The Court held that when the officers entered the common area of the apartment building they did so with the explicit permission of other tenants of the apartment building. The Court held further that the officers did not violate the Fourth Amendment by entering into the apartment of Taylor at Hill's invitation, and that they were where they had a right to be when they saw the marijuana stem in plain view.

The only difficult question for the Court was whether the protective sweep of the apartment was reasonable or not. Relying upon *Maryland v. Buie*, 110 S.Ct. 1093; 108 L.Ed. 2d 276; 494 U.S. 325 (1990), the Court affirmed the finding of the district court that the protective sweep had been reasonable. "We think that it follows logically that the principle enunciated in *Buie* with regard to officers making an arrest—that the police may conduct a limited protective sweep to ensure the safety of those officers—applies with equal force to an officer left behind to secure the premises while a warrant to search those premises is obtained. We emphasize, however, that the purpose of such a protective sweep is to protect the safety of the officer who remains at the scene, and for that reason, the sweep must be limited to a cursory search of the

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premises for the purposes of finding persons hidden there who would threaten the officer's safety."

SHORT VIEW . . .

1. *People v. King*, 16 P.3d 807 (Colo. 1/16/01). Sometimes the question of whether the police have arrested someone, and thus must have probable cause, or only detained someone, under a standard of reasonable suspicion, is important to the outcome of a case. The Colorado Supreme Court has held in this case that one of the significant factors bearing on the question is the amount of force used during the arrest/detention. In this case, the police drew their weapons, required the occupants of a truck to get out and get on the ground, after which the police handcuffed them. The Court held that under the circumstances of this case, in which there was no evidence of probable cause and little evidence that the occupants of the truck were threatening the security of the officers, the use of force constituted an arrest requiring probable cause. The Court noted that when "officers use force typically associated with an arrest—such as the drawing of weapons, physical restraint, and the use of handcuffs—the prosecution may not characterize the encounter as an investigatory stop unless specific facts or circumstances exist that render the use of such force a reasonable precaution for the protection and safety of the officers."

2. *People v. Fondia*, 740 N.E. 2d 839 (Ill. App. Ct., 12/21/00). The police stopped a car for a traffic violation, and subjected the car to a narcotics dog search. When the dog alerted to the car, the police ordered the passengers out of the car and searched them. They found a crack pipe in Fondia's pocket. The Illinois Appellate Court, Fourth District, held that the search was violative of the Fourth Amendment. While the dog's alert provided probable cause regarding the car, there was no probable cause that a particular passenger had contraband on him. The police should have subjected each passenger to a narcotics dog sniff, which, relying on *United States v. Place*, 103 S.Ct. 2637; 77 L.Ed. 2d 110; 462 U.S. 696 (1983), would not have been a search.

3. *Ford v. State*, 776 So. 2d 373 (Fla. Dist. Ct. App., 1/17/01). When a citizen reports seeing a man hand another man cash, in return for an unidentified item, that is not sufficient for the police who receive the report to conduct an investigative detention. Here, a citizen called the police and told them that she had seen a black man approach a white man, the white man put something in his pocket, and the white man give the black man cash. She thought it was a drug deal. When the police investigated, they found a rock of crack cocaine in Ford's pocket. Because the citizen was not a trained police officer, and because the area in which the observations were made was not known as an area known for narcotics transactions, the observations failed to rise to the level of a reasonable and articulable suspicion.

4. *Kopkey v. State*, 743 N.E. 2d 331 (Ind. 1/29/01). The State may conduct random urine tests of a person sentenced to home incarceration without violating the Fourth Amendment. In this case, the defendant had agreed as part of his sentence to subject himself to random urine tests in front of an officer. The Court held that the language in the home detention agreement did not violate the Fourth Amendment. While the defendant had a reasonable expectation of privacy, the agreement was justifiable under the "special needs" category of searches pursuant to such cases as *Griffin v. Wisconsin*, 107 S.Ct. 3164; 97 L.Ed. 29 709; 483 U.S. 868 (1987) and *Vernonia School District 47J v. Acton*, 115 S.Ct. 2386; 132 L.Ed. 2d 564; 515 U.S. 646 (1995).

5. *State v. Gilkey*, 18 P.3d 402 (Or. Ct. App., 1/24/01). Even though an officer had a reasonable suspicion justifying the seizure of a chapstick tube, he could not search the inside of it without a warrant. Here, a crucial aspect of the Oregon Court of Appeals' analysis was that the justification for the seizure, officer safety, ended once the officer seized the chapstick, and that the officer testified at the suppression hearing that he did not know what was in the chapstick, whether it had contraband or a weapon. Here, the "searching officer…lacked subjective probable cause to believe that the ChapStick tube contained unlawful controlled substances…Craddock's uncertainty about the presence of the contraband in the ChapStick tube does not rise to the level of subjective probable cause."

6. *Cruz v. Laramie*, 239 F.3d 1183 (10th Cir. 2/15/01). "Hog-tying" a person with diminished capacity caused by mental illness or substance abuse is violative of the Fourth Amendment according to the 10th Circuit in this 42 USC 1983 case. Here, the person hog-tied died, and his brother filed a civil rights action alleging a violation of his brother's constitutional rights.

7. *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2/13/01). A jail may not strip search all persons entering the jail despite the fact that arrestees are housed with convicted inmates.

8. *Taylor v. State*, 2001 Tex. App. LEXIS 1264 (Tex. Ct. App. 2/27/01). The Texas Court of Criminal Appeals explores some of the issues related to warrants and computers. Here, the defendant had registered an AOL screen name like one that had been used to send child pornography. A warrant was obtained based upon this information, and evidence was found on the defendant's computer. The Court of Criminal Appeals held that the information presented in the affidavit was insufficient to establish probable cause, lacking information on how the police obtained the

defendant's name and address. Particularly lacking was information regarding AOL, whether more than 1 person has a particular name, how names are assigned by AOL, etc.

9. *People v. Gall*, 2001 Colo. App. LEXIS 182 (Not yet final) (Colo. 3/5/01). A warrant authorizing the seizure of "any and all written or printed material" can fairly be read to authorize the seizure of laptop computers, according to the Colorado Supreme Court. "[A] warrant cannot be expected to anticipate every form an item or repository of information may take, and therefore courts have affirmed the seizure of things that are similar to, or the 'functional equivalent' of, items enumerated in a warrant, as well as containers in which they are reasonably likely to be found…Contrary to the holding of the trial court, the computers found in the defendant's closet were reasonably likely to serve as 'containers' for writings, or, the functional equivalent of 'written or printed material,' of a type enumerated in the warrant."

10. *State v. Munroe*, 2001 Wisc. App. LEXIS 278 (Not yet final) (Wis. 3/20/01). The police were investigating a drug-infested motel, and learned that the defendant had paid cash and had not shown identification upon registration. They went to his room, and told him that they were investigating the violation of a local ordinance outlawing the registering in a motel under a false name. The defendant showed proper identification. The police asked to search the room, and the defendant said no. They continued to question him, and again asked to search the room, to which the defendant acquiesced. Marijuana was found in a backpack during that search. The Wisconsin Supreme Court held that the defendant's "consent" was involuntary, and the marijuana should have been suppressed. Relying upon *Johnson v. United States*, 68 S.Ct. 367; 92 L.Ed. 436; 333 U.S. 10 (1984), the Court said that "the non-objected-to warrantless entry by law enforcement officers into 'living quarters' is entry 'demanded under color of office' and is thus 'granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.'"

11. *State v. Rutzinski*, 623 N.W. 2d 516 (Wis., 3/20/01). An anonymous tip from a cell phone telling the police about a drunk driver is sufficient justification for stopping the car. Distinguishing *Florida v. J.L.*, 120 S.Ct. 1375; 146 L.Ed.2d 254; 529 U.S. 266 (2000), the Court found under the unique circumstances that because the caller was in front of the alleged drunk driver, and the police car was behind the driver, that the caller knew she was risking a charge of giving a false report, and thus the reliability of the anonymous tip was demonstrated. Further, the Court found that under the balancing test, the stop was reasonable. "[W]e recognize that there may be circumstances where an informant's tip does not exhibit indicia of reliability that neatly fit within the bounds of the *Adams-White* spectrum, but where the allegations in the tip suggest an imminent threat to the public safety or other exigency that warrants immediate police investigation. In such circumstances, the Fourth Amendment and Article I, Section 11 do not require the police to idly stand by in hopes that their observations reveal suspicious behavior before the imminent threat comes to its fruition. Rather, it may be reasonable for an officer in such a situation to conclude that the potential for danger caused by a delay in immediate action justifies stopping the suspect without any further observation. Thus, exigency can in some circumstances supplement the reliability of an informant's tip in order to form the basis for an investigative stop."

12. *People v. Lidster*, 747 N.E.2d 419 (Ill. App. Ct., 3/30/01). The police may not set up an informational roadblock in an effort to investigate a past crime. This runs into the proscription of law enforcement roadblocks recently discussed in *Indianapolis, Ind. V. Edmond*, 121 S.Ct. 447; 148 L.Ed.2d 333; 531 U.S. 32 (2000). Here, the defendant was stopped at a roadblock and charged with DUI, where the purpose of the roadblock was to investigate a week-old hit-and-run. "*Edmond* strongly suggests that a criminal investigation can never be the basis for a roadblock, at least absent some emergency circumstance not present here…[I]t seems likely that more traditional law enforcement techniques would have been just as, if not more, effective than the roadblock without infringing on the constitutional rights of numerous motorists, none of whom was suspected of a crime."

13. *Krise v. State*, 746 N.E.2d 957 (Ind. 5/9/01). Consent by a boyfriend to search a home shared with a girlfriend does not give the police authority to search the girlfriend's purse, according to this decision by the Indiana Supreme Court. The Court considered *United States v. Matlock*, 94 S.Ct. 988; 39 L.Ed.2d 242; 415 U.S. 164 (1974), *Wyoming v. Houghton*, 119 S.Ct. 1297; 143 L.Ed.2d 408; 526 U.S. 295 (1999), and *Florida v. Jimeno*, 111 S.Ct. 1801; 114 L.Ed.2d 297; 500 U.S. 248 (1991) in reaching this decision. "[W]e hold that the inspection of closed containers that normally hold highly personal items requires the consent of the owner or a third party who has authority—actual or apparent—to give consent to the search of the container itself." ■

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JUROR MISCONDUCT: PROTECTING YOUR CLIENT'S RIGHT TO A FAIR AND IMPARTIAL FACTFINDER

by Sue Martin and Joe Myers

INTRODUCTION

This article attempts to give an overview of certain types of juror misconduct that Kentucky defense practitioners may encounter and offer some "how-to" guidance in addressing them.

In *Litigating Juror Misconduct Claims*, the Equal Justice Initiative of Alabama describes three main types of juror misconduct:

- ! the consideration of extraneous (extrajudicial) evidence,
- ! improper third party contacts, and
- ! lack of candor (or lying) in voir dire.

The first includes (but is not limited to) times when jurors do their own experiments or consult sources such as dictionaries and report their findings to the jury. The second, improper third party contacts, occurs when even one juror has prejudicial contacts with the judge, prosecutor, witnesses or other third parties. The third category, lack of candor (or lying) in voir dire, is significant in that, in Kentucky, such prejudicial errors are reversible even where a juror's conduct is inadvertent. This article also includes a fourth section of exploring certain kinds of other jury misconduct, *e.g.*, prejudging the case or discussing it prior to deliberations, and where jurors are intoxicated or even sleeping at trial. All such misconduct may violate a defendant's rights of confrontation, cross-examination, counsel, due process, an impartial jury and a fair trial. U. S. Constitution, 5th, 6th and 14th Amendments, Ky. Constitution, Sec. 1, 2, 3, 11.[1]

I. CONSIDERATION OF EXTRANEOUS (EXTRAJUDICIAL) EVIDENCE:

A. Applicable Legal Principles

The Sixth Amendment right to a trial by jury guarantees a defendant a fair trial by an impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The right to an impartial jury also originates in due process principles, *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976), which require that the jury be free from outside influences. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

The evidence against a defendant *shall* come from the witness stand in a public courtroom where there is full judicial protection of the right of confrontation, cross-examination, and counsel. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). Where jurors obtain information or "evidence" from an outside source, this may undermine their verdict as surely as third-party contacts can. *Sheppard, supra*. There is no distinction between the two in determining whether the verdict was tainted. *Jeffries v. Blodgett*, 5 F.3d 1180, 1190 n.2 (9th Cir. 1993), *aff'd on rehearing en banc sub nom. Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997). Jurors who receive "extrinsic" evidence will not be impartial. Nor can such "evidence" be confronted or cross-examined. Hence the verdict will be tainted, such that appropriate action on the part of defense counsel is imperative.

The trial court has the discretion to determine whether it should infer prejudice from the jurors' exposure to the extrinsic evidence or conduct a post-trial hearing. *See Smith v. Commonwealth*, Ky., 734 S.W.2d 437, 445 (1987) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845 (1984)) and *Haight v. Commonwealth*, Ky., 938 S.W.2d 243, 246 (1996). A hearing is usually necessary to determine the extent to which the jurors discussed the extrinsic information. *See United States v. Williams-Davis*, 90 F.3d 490, 501-02 (D.C. Cir. 1996), *United States v. Ruggiero*, 928 F.2d 1289 (2d Cir. 1991), and *Dickson v. Sullivan*, 849 F.2d 403, 406 (9th Cir. 1988).

Once a defendant has shown prejudice, either through a presumption or from the evidence, the Court should order a new trial unless the government proves that there is no reasonable possibility that the verdict was tainted by the improper information. *See United States v. Harber*, 53 F.3d 236, 242 (9th Cir. 1995) and *Llewellyn v. Stynchcombe*, 609 F.2d 194, 195 (5th Cir. 1980).

In the appropriate circumstances, post-trial hearings on juror misconduct issues are mandatory under the federal constitution. *See, e.g., Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 945 (1982) *and Remmer v. United States*, 347 U.S. 227 (1954). In spite of this, Kentucky defense practitioners who seek to obtain such hearings may encounter resistance stemming from Kentucky Rule of Criminal Procedure 10.04. This rule states, "A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." RCr 10.04. Courts and practitioners, however, must be aware that state evidentiary rules such as RCr 10.04 ought not to apply where they would otherwise bar the consideration of viable claims of federal constitutional violations. This includes situations where jurors consider *new (extrinsic) evidence* in the jury room. *See, e.g., Doan v. Brigano*, 237 F.3d 722 (6th Cir. 2001) *and Warden, Kentucky State Penitentiary v. Gall*, 865 F.2d 786, 788-89 (6th Cir. 1989).[2] Alternatively, under Kentucky law, the court may invoke the "appearance of evil" principle, an exception to the prohibition against the post-trial examination of jurors. It allows the court to determine whether prejudicial events occurred, so that it is not "helpless to address the wrong." *See Dillard v.*

Ackerman, Ky., 668 S.W.2d 560, 562 (1984).[3] When encountering resistance based upon RCr 10.04, defense practitioners should first preserve the federal constitutional issue by presenting the court with relevant authorities, such as the ones provided herein. Then, where possible, present evidence of juror misconduct through witnesses other than the jurors themselves,[4] and call the jurors to testify by avowal, alleging violations of your client's federal constitutional right to a trial by jury, to a fair and impartial jury, to fundamental fairness, and to both substantive and procedural due process, under the Sixth and Fourteenth Amendments.

B. Improper Contacts with Court Personnel

Jurors' improper contacts with court personnel may taint the verdict. In *Turner v. Louisiana*, 379 U.S. 466 (1964), the United States Supreme Court reversed the defendant's murder conviction and death sentence because two deputy sheriffs who were essential state witnesses were overseeing the jury, sharing meals, conversing, and doing their errands. Such contacts were presumptively prejudicial. The deputies' testimony was in direct conflict with the defendant's, which "must inevitably have determined whether Wayne Turner was to be sent to his death." *Id.* at 473.

In *Parker v. Gladden*, 385 U.S. 363 (1966), the United States Supreme Court reversed the defendant's second degree murder conviction because the bailiff told the jurors the defendant was "wicked" and "guilty," and that if anything was wrong with their verdict, the Supreme Court would correct it. Even though only one juror admitted that the remarks prejudiced her, the Court emphasized the official nature of the misconduct and the fact that the defendant was entitled to no less than *twelve* impartial jurors. *Id.* at 365.

At times, even inadvertent errors of this type may warrant reversal. In *Deemer v. Finger*, Ky., 817 S.W.2d 435 (1991), the Supreme Court granted a new trial where the record on appeal showed that a juror and the judge had spoken while counsel for neither party was present. At that time, the juror confided that her husband had told her things about the case that were not in evidence, but the judge failed to notify counsel. *Id.* at 437. The Court found that, no matter how inadvertently, the judge committed palpable error. "The juror's comments fairly command the inference that she allowed her husband to address her concerning the substance of the case being tried, in transgression of her oath and the court's admonitions." *Id.* (footnote omitted). The rule in *Deemer*, however, does not apply where a juror's undisclosed information would not have formed a viable basis for a challenge for cause, or where counsel's voir dire questions would not have elicited the basis for a peremptory challenge. *See Moss v. Commonwealth*, Ky., 949 S.W.2d 579 (1997).[5]

C. Juror Experiments

Jurors' experiments may result in constitutional error, as was clearly evident in *Doan v. Brigano*, 237 F.3d 722 (6th Cir. 2001). In this case, the defendant testified that he could not see any bruises on the toddler victim in a dimly lit area of their home. After hearing this, a juror tested the idea by putting lipstick on her arm in dim lighting. This confirmed her belief that indeed, "bruises" *were* visible in such light, a conclusion she shared with the other jurors. *Id.* at 726-77. The Ohio Supreme Court declined to rule on the merits because of a state evidentiary rule prohibiting the use of juror testimony to impeach the verdict.

On federal habeas review, the Sixth Circuit found that, in fact, the juror became an "expert witness" in sharing her test results with the other jurors. *Id.* at 733. This "testimony," however, did not come from the witness stand, subject to confrontation and cross-examination. Nor was it on the record or subjected to evidentiary rules. Consequently, it injected extraneous and potentially prejudicial evidence into the jury's deliberations. *Id.* The Court concluded that indeed, there were violations of the defendant's Sixth and Fourteenth Amendment rights to confront the evidence and the witnesses against him, as well as his right to a jury that considers only the evidence presented at trial. *Id.* at 736. Under the facts of the case, however, and the highly restrictive standards of habeas corpus review, the error was harmless. *Id.* at 739.[6]

In *In re Beverly Hills Fire Litigation*, 695 F.2d 207, 211-12 (6th Cir. 1982), the Sixth Circuit considered a case where an expert had testified about aluminum wiring. One juror examined the wiring and connections in his own home and reporting his findings to the jury. This tainted the verdict by "injecting extraneous information into the trial." *Id.* at 213. Under the federal rules of evidence, a juror may not impeach his verdict, but an exception exists where *external* factors may have affected the jury's deliberations. *Id.* The exception assures that the parties receive a fair trial and maintains the integrity of the system. *Id.*

D. Knowledge of Defendant's Prior Bad Acts or Reputation

Where a defendant's prior bad acts are not in evidence, the jury's knowledge of them may be so prejudicial as to require reversal. Such was the case in *United States v. Keating*, 147 F.3d 895 (9th Cir. 1998). The Court granted a new trial because at least one juror in the defendant's federal trial for fraud and racketeering learned that the defendant had been convicted in state court for the same conduct, and the jurors discussed the state conviction during deliberations. *See also Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997) (jury discussed defendant's prior robbery conviction during deliberations) *and Lawson v. Borg*, 60 F.3d 608 (9th Cir. 1995) (jury disbursed information that defendant was "very violent" and "had a violent temper.").

E. Exposure to Prejudicial Outside Influences

Jurors may be exposed to many prejudicial outside influences. Take for example *Nevers v. Killinger*, 169 F.3d 352 (6th

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Cir. 1999), *partially overruled on other grounds by Terry Williams v. Taylor*, 120 S.Ct. 1495 (2000). In this case, the defendant, a white policeman, was convicted of second-degree murder for killing an African American man whom he and a fellow officer had tried to arrest. A week before deliberations, when the jurors were obliged to be at the courthouse but not in trial, court personnel gave them videos to watch, including the movie, "Malcolm X." *Id.* at 356. It began with, *inter alia*, video clips of Rodney King being beaten by police officers. The defense motion for a mistrial was denied. *Id.*

After the verdict was returned, the petitioner and his co-defendant presented several affidavits from jurors who stated that, apart from the video, they were privy to the extraneous information that, e.g., the petitioner was part of a police undercover unit that was notorious for harassing black men. The court denied an evidentiary hearing and the motion for new trial. *Id.* at 357, 369.

On direct appeal, the Michigan Supreme Court opined that the extrinsic influences were harmless because the evidence of the petitioner's guilt was overwhelming. *Id.* at 354. On federal habeas review, the Sixth Circuit held that, on the contrary, the extrinsic evidence had a "substantial and injurious effect or influence in determining the jury's verdict,'" and resulted in actual prejudice. *Id.* at 373 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Specifically, the sole issue at trial was *why* the petitioner had beaten the victim. He maintained that he had only intended to subdue the victim, protect himself, and force the victim to relinquish an object that could have been a weapon. *Id.* at 372. Because the extrinsic evidence of the racist undercover unit "set the tone" for the jury's deliberations, it surely caused the jury to discredit the defense. *Id.* at 373.

F. The Bible, Dictionaries and the Reader's Digest

Prejudicial outside influences include any extrinsic authorities to which jurors turn for guidance. In *Jones v. Kemp*, 706 F.Supp. 1534 (N.D. Ga. 1989), a death penalty case, the court granted habeas relief because a Christian Bible was allowed in the jury deliberation room. *See also Grooms v. Commonwealth*, Ky., 756 S.W.2d 131, 142 (1988) (at death penalty retrial, jurors prohibited from taking Bibles into the deliberation room) *and State v. Harrington*, 627 S.W.2d 345 (Tenn. 1981), *cert. denied*, 457 U.S. 1110 (1982) (death penalty resentencing ordered).

Misguided jurors may also consult standard dictionaries. In *State v. Abell*, 383 N.W.2d 810 (N.D. 1986), the trial court declined to define "force," but this was the only issue for the jurors at the defendant's trial on charges of gross sexual imposition. During deliberations, they used a dictionary, which warranted reversal.[7] Jurors might even check the Reader's Digest. In *Moore v. State*, 324 S.E.2d 760 (Ga. 1984), the court reversed where a juror looked up "manslaughter" in "You and the Law," a Reader's Digest publication, and shared his insights with other jurors. The extrinsic "law" was so prejudicial that the verdict was inherently lacking in due process. *Id.* at 761.

II. OUTSIDE AND THIRD PARTY INFLUENCES

A. The FBI Investigates

Jurors' exposure to outside and third party influences can undermine the integrity of the trial. In *Remmer v. United States*, 347 U.S. 227 (1954), a juror told the judge that someone had tried to bribe him into returning a verdict in favor of the defendant, who was ultimately convicted of tax evasion. After telling the prosecutors (but not the defense), the judge ordered the FBI to investigate. Concluding that the statement was in jest, the judge did nothing further. *Id.* at 228. After learning of the matter in post-verdict news articles, the defendant filed a motion for new trial, requesting a hearing. In affidavits, the defendant's attorneys stated that, had they known of the incident, they would have moved to replace the juror with an alternate. *Id.* at 228-29. The trial court denied relief, as did the Court of Appeals. *Id.* at 229.

The United States Supreme Court remanded the case for a hearing where all parties were permitted to take part, with the government bearing the heavy burden of proving that the error was harmless. *Id.* at 229-30. The court was to determine the circumstances, their impact on the juror, and whether they were prejudicial. *Id.* "In a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror during trial *about the matter pending before the jury* is . . . presumptively prejudicial," if not made pursuant to court rules and the court's directions, with full knowledge of the parties. *Id.* at 229 (emphasis added).[8] Sending an F.B.I. agent in the midst of trial to investigate the juror's conduct was an unauthorized invasion of the jury that was bound to unduly impress the juror.

B. Everyday Third Party Contacts

A different brand of third party contacts occurred in *Stockton v. Virginia*, 852 F.2d 740 (4th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989), where the United States Court of Appeals for the Fourth Circuit vacated the defendant's death sentence because of a third-party contact that occurred after the jury had begun deliberating. While eating together at the Owl Diner, the jurors conversed with the owner, who stated, *inter alia*, that they ought to "fry that son of a bitch." In *May v. State*, 716 N.E.2d 419 (Ind. 1999), the Indiana Supreme Court reversed the defendant's conviction, holding that the trial court abused its discretion in denying the defense motion to replace a juror with an alternate. Upon meeting a state's witness in a restaurant, the juror invited the officer to watch HBO boxing with him the following weekend. This contact "no doubt affected" the juror's ability to assess the witness' credibility.

III. LACK OF CANDOR IN VOIR DIRE (KNOWING OR INADVERTENT)

A. Applicable Legal Principles

Voir dire protects a party's right to a fair trial and an impartial jury by exposing prospective jurors' conscious and unconscious biases. *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1984). A defendant may obtain a new trial where he or she can establish that a juror "failed to answer honestly a material question on voir dire," and "that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

The voir dire process allows the court to select an impartial jury and assists counsel in exercising their peremptory challenges intelligently. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). The right of exercising peremptory challenges includes the incidental right that the information elicited on voir dire be **true**. *Olympic Realty Co. v. Kamer*, 283 Ky. 432, 141 S.W.2d 293 (1940). Even if a juror gives false answers unintentionally, this does not affect the right to a new trial if a party has relied upon the false information. *Id.* [9] Where a juror fails to answer a voir dire question frankly, a court may admit post-trial explanatory statements without violating the rule against impeaching the verdict through juror testimony. *Drury v. Franke*, 247 Ky. 758, 57 S.W.2d 969, 984-86 (1933). Importantly, however, to prevail on this issue, a defendant must show that the defense voir dire was such that it would have elicited the missing information. *Moss*, *supra*.[10]

Untruthful answers on voir dire strongly suggest a juror's lack of impartiality. *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989) (dishonest answers strongly suggest bias); *United States v. Perkins*, 748 F.2d 1519, 1531-33 (11th Cir. 1984) (dishonest answers raise presumption of bias); *McCoy v. Goldston*, 652 F.2d 654, 659 (6th Cir. 1981) (presumption of bias arises from deliberate concealment). If a defendant successfully demonstrates actual or implied bias, reversal is automatic. *Smith v. Phillips*, 455 U.S. 209, 222 (1982). Because the impartiality of the jury lies at the very integrity of the legal system, the presence of even *one* biased juror among the twelve *cannot* be harmless error. *Paenitz v. Commonwealth*, Ky., 820 S.W.2d 480, 482 (1991) (citing *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 2057, 95 L.Ed.2d 622 (1977)).

In sum, a defendant is entitled to a new trial where he or she can show that a juror failed to respond honestly in adequate voir dire questioning, that a candid response would have provided a valid basis either for a challenge for cause, or the use of a peremptory challenge, and the presence of bias, either actual or implied. Once the juror's bias is established, reversal is automatic.

B. Failure to Respond Candidly in Voir Dire

A classic case of an untruthful juror is *Paenitz v. Commonwealth*, Ky., 820 S.W.2d 480 (1991), where the defendant was convicted of the unspeakable crime of raping a baby. Prior to trial, a potential juror chanced to meet the government's expert witness at their local gym. The expert confided details about the case, which was "awful." *Id.* at 481. When questioned in voir dire, however, the juror revealed nothing, stating that her knowledge of the expert would not influence her decision. The defense did not challenge her for cause or use a peremptory strike against her. *Id.*

Nothing came to light until the expert contacted the prosecutor shortly after trial. Thereafter, the juror testified in a post-trial hearing. *Id.* On appeal, the Court reversed, noting that the juror's lack of basic truthfulness was a "flagrant abuse" of her responsibility, which struck at the very bedrock of the constitutional right to a trial by an impartial jury. *Id.* If only one juror was not convinced beyond a reasonable doubt that there had been penile rather than only digital penetration, the defendant could not have been convicted of rape, but only a lesser-included offense. Had the uncandid juror revealed her pretrial conversation with the government's expert, such a juror could have been seated in her place. *Id.* at 482. The Court concluded that the crime was such that it was tempted "to find only harmless error so that we might affirm . . ., but this would only prove the maxim that 'Hard cases make bad law.' Our clear duty to our revered legal system requires us instead to reverse the judgment of conviction and to remand for a new trial." *Id.*

Though *Paenitz* may illustrate a worst-case scenario, in Kentucky, a juror's failure to answer candidly in voir dire need *not* be intentional to warrant reversal. This well-settled principle was reaffirmed in *Anderson v. Commonwealth*, Ky., 864 S.W.2d 909 (1993). Here, the Court reversed the defendants' convictions for first-degree rape and first-degree criminal abuse where, *inter alia*, an affidavit in a motion for new trial compelled the inference that a juror concealed vital information on voir dire. The information may have justified a challenge for cause on grounds of implied bias and allowed the defense to use its peremptory challenges intelligently. *Id.* at 911-12.

Specifically, the defense theory was that the juvenile complaining witness had fabricated the charges to "punish" the Andersons (her mother and step-father), for cutting off her relationship with Willie Watson, a man more than twice her age. *Id.* at 911. When the uncandid juror was asked in voir dire if he knew Watson, he failed to reveal that he was related by marriage, lived nearby, and had spent time visiting Watson. *Id.* at 911. The harm of this non-disclosure did not depend upon whether the juror's act was knowing or inadvertent. The right of peremptory challenges includes the incidental right that the information elicited on voir dire be **true**. *Id.* at 912 (citations omitted). A[A] verdict is illegal when a peremptory challenge is not exercised by reason of false information." *Id.*

Under *Anderson*, therefore, a defendant is entitled to a new

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trial where he or she demonstrates that, regardless of the juror's good or bad faith, the information that the juror failed to disclose in voir dire may have justified a challenge for cause on grounds of implied bias, and where such information would have enabled the defense to exercise its peremptory challenges intelligently. *Id.* at 911-12. Notably also, the Court strongly implied the need for a hearing. *Id.* at 914-15.

Jurors' non-disclosures in voir dire may involve a wide range of other subjects. *See, e.g., Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991) (where defendant allegedly murdered her husband, juror's failure to disclose her own history as abuse victim entitled petitioner to habeas relief), *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (where juror failed to disclose that her brother was a homicide victim and that she was the victim of other crimes, her bias was presumed), *and State v. Santiago*, 715 A.2d 1 (Conn. 1998) (court must investigate allegation that juror was racially biased and conduct detailed questioning of both the person who made the allegation and the juror in question).

IV. OTHER TYPES OF JUROR MISCONDUCT

A. Discussing Case and Prejudging the Case

In *Doyle v. Marymount Hospital*, Ky. App., 762 S.W.2d 813 (1988), the Court reversed because a juror discussed the case with an acquaintance and had an opinion about it before deliberations. [11] *See also United States v. Resko*, 3 F.3d 684 (3rd Cir. 1993) (drug-related convictions reversed where every juror admitted to premature deliberations) *and Holland v. State*, 587 So.2d 848 (Miss. 1991) (ordering retrial of penalty phase in capital case where jurors decided upon a death sentence before the penalty phase began).

B. Intoxicated Jurors

Though jurors' personal conduct must be carefully monitored, at times, even the best efforts fail. In *People v. Lee Chuck*, 78 Cal. 317, 20 P. 719 (Cal. 1889), where the California Supreme Court reversed the defendant's conviction and death sentence because it was clear and undisputed that the jury drank heavily in deliberations. The natural consequence was to affect the jury's ability to perform its duties "when a cool head and unclouded brain were so essential to the preservation of the rights of the defendant." *Id.* at 335-36. *See also People v. Hedgecock*, 795 P.2d 1260 (Cal. 1990). *But cf. Trent v. Commonwealth*, 292 Ky. 735, 166 S.W.2d 1002 (1942), where the defendant's murder conviction and death sentence were affirmed because he had failed to show that the jurors' occasional drinking interfered with their ability to hear and decide the case properly.

C. Sleeping Jurors

Some jurors just can't keep their eyes open. In *Spunaugle v. State*, 946 P.2d 246 (Okla. 1997), the court reversed the defendant's conviction and death sentence because one of the jurors was sleeping. The defense motion to replace the juror was denied. Because the record clearly showed that the juror *was* asleep, this was an "unacceptable degradation of due process which require[d] reversal." *Id.* at 253. *See also People v. Evans*, 710 P.2d 1167 (Colo. Ct. App. 1985) (constitutional right to a fair jury trial denied where juror was asleep).

Prevailing on this issue, however, is not easy. In *Powell, et al. v. Louisville & Nashville Railroad Co*, 172 Ky. 285, 189 S.W. 213 (1916), the appellant alleged that a juror had slept, but the court found the evidence insufficient. Though two jurors' affidavits stated that a third had indeed been dozing, the third juror's own affidavit denied it. *Id.* at 288, 189 S.W. at 214. No objection was made to preserve the error, *Id.*., and the affidavits failed to state the parts of trial through which the juror had nodded off. *Id.* at 288, 189 S.W. at 214-15. Under this reasoning, defense counsel should be on the look-out for such jurors and alert the court immediately. Should the error come to light only after trial, any post-trial affidavits should identify (where possible) the parts of trial through which the juror slept.

V. DEALING WITH JUROR MISCONDUCT

A. Pretrial

Juror misconduct is unlikely to be the primary concern of the trial attorney in preparing his or her case. Nevertheless, one should keep in mind that every jury trial is susceptible of being infected by it. Such misconduct may negate or overcome the efforts of counsel who is providing otherwise effective representation. As discussed previously, juror misconduct can take many forms. Some may be innocent while others merit serious scrutiny by the practitioner. One veteran DPA attorney believes that when a criminal defendant is being tried in a small or sparsely populated county, one must be especially careful about who knows whom and the sources of information they obtain. Furthermore, jurors often minimize what they know about a case. When reviewing the prospective juror sheets with one's client, it would be well to note any connections jurors may have with the parties to the suit, the juror's geographical location in relation to the purported crime and interested parties, job or other common features with the victim or victim's family, and law enforcement (to name but a few). This information may not prevent potential juror misconduct, but as noted below, it is helpful in preparing voir dire. It may also be useful later in the case.

Additionally, whenever possible, have someone in the audience observe what happens during breaks, lunchtime, and while waiting for court to start. Ideally, choose someone other than the defendant's family or friends. He or she may observe violations of the court's admonitions under RCr 9.68 and 9.70 or overhear courthouse conversations to which the court must be alerted.

Finally, where possible, have someone attend the judge's jury term opening day orientation for jurors or obtain any information the jurors receive explaining their obligations and responsibilities. It is a great opportunity to find out what the court has told the jurors in terms of their conduct and any admonitions to which they will be subject. It is also an excellent idea to take a look at the jury room to make sure there are no books housed there, such as dictionaries, Bibles, other reference materials or newspapers.

B. Voir Dire

As noted previously, the nature of the case, the locality and its notoriety are all factors to consider in questioning and choosing a jury. The importance of a thorough voir dire cannot be overstated, as discussed in *Moss v. Commonwealth*, Ky., 949 S.W.2d 579 (1997). The defendant is primarily responsible for asking the proper questions in voir dire. The failure to do so generally precludes relief. Thus, if information is disclosed during the course of trial or later, and it was not addressed in voir dire, the complaining party may be foreclosed from any corresponding challenge.

While the primary purpose of voir dire is to select a fair and impartial jury, keep in mind that those jurors who are forgetful or less than totally forthcoming may still provide your client with the basis for a potential avenue of relief when the information is finally disclosed. *See Anderson, supra.* Voir dire is also an opportunity to educate the jurors. If counsel feels it is warranted, this could include reminding them of their solemn responsibility, that in fact like the judge, prosecutor, defense lawyer and bailiff, they are under the duty of an oath or affirmation to fulfill their obligations. This is necessary to make the system remain fair and impartial for all accused citizens. The instructions and court admonitions in every trial should specify that the jury consider only the evidence presented in court. The jury should be reminded that one reason for this is that everyone should have a chance to challenge evidence that is unreliable, untrustworthy, or false. Otherwise, the jury could receive unreliable or incomplete evidence that has not passed proper scrutiny. Jurors should be able to relate to the unfairness in their ordinary lives.

While these may seem basic to the criminal practitioner, many folks serve only seldom on juries in their lifetime. It is a serious process. The jury must be reminded that the rules and precautions are there for all citizens, not just your client. *See, e.g., Gordon, supra*.

C. Trial

Once the jurors are sworn, the trial judge is to admonish them that, among other things, they are not to converse among themselves on any subject connected with the trial until the case is finally submitted to them. *See* RCr 9.70. Likewise, if any party tries to discuss the case with them, they are to report that to the judge as well. *See also* KRS 29A.310(2) which prohibits any officer, party, witness or attorney from speaking with the jury about an action pending before them unless granted leave of court to converse with them or any member thereof after the jury has been sworn.

Before the jury is sworn, counsel has a chance to address any juror bias or fear of misconduct by exercising strikes for cause (RCr 9.36) or peremptories (RCr 9.40). Once the jury is sworn in, however, the matter of juror removal becomes more complex. At any point at trial (before the verdict is returned), whether during the guilt phase or deliberations, a party with knowledge of juror misconduct must alert the trial court. Any failure to do so will generally waive his or her right to rely on the alleged misconduct as a ground for a new trial. *See McIntosh v. Commonwealth*, 234 Ky., 192, 27 S.W.2d 971 (1930).

As discussed previously, different types of juror misconduct are viewed differently by the courts. The court in *Byrd v. Commonwealth*, Ky., 825 S.W.2d 272 (1992) noted "a judge has discretion in determining the prejudicial effect of a juror's misconduct, particularly if there is an opportunity to give a curative admonition." (Citation omitted). The *Byrd* court further noted "Ynot every incident of juror misconduct requires a new trial. The true test is whether the misconduct has prejudiced the defendant to the extent that he has not received a fair trial." Citing *United States v. Klee*, 494 F.2d 394 (9th Cir. 1974). The Byrd court deferred to the trial judge, who "Ywas in a better position than we are to determine whether what happened was prejudicial."

Thus, whenever suspected misconduct is brought to the practitioner's attention during trial, prior to verdict, the practitioner should seriously consider approaching the court and asking for an evidentiary hearing. Obviously, relief can be sought in the form of a mistrial initially. However, in many cases, particularly where counsel's attention is focused on the trial and related matters, seeking an inquiry and presenting evidence to the court followed by a motion for a mistrial (if warranted by the evidence) (*see Morton v. Commonwealth*, Ky., 817 S.W.2d 218 (1991)) may be the better practice. If the court, after hearing the evidence, denies your motion for a mistrial, but instead provides an admonition, should you believe that the admonition is not adequate, you must let the court know this and explain why you are taking that position. *See Clay v. Commonwealth*, Ky. App., 867 S.W.2d 200 (1993). Otherwise the appellate court will presume that an admonition "controls the jury and removes the prejudice." *Id*. Of course, the court may alternatively determine that the juror can be excused and an alternate juror provided (RCr 9.40(2)) to take his or her place. This curative action may help prevent your client's jury panel from being infected by a partial and biased juror. Moreover, counsel, who during the heat of trial, has raised this issue, is not prevented from litigating it further with the benefit of more preparation in a motion for a new trial under RCr 10.02.

Prior to the jury retiring to the jury room for deliberations, one should scrutinize what items are sent back with the ju-

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rors. Counsel should be sure that only those items introduced into evidence and the jury instructions are permitted in the jury room. Make sure any evidence such as tape recordings and documents which contain extraneous, potentially prejudicial information not introduced in evidence are properly redacted.

D. Deliberations

RCr 9.68 states provides that "when the jury is kept together in charge of officers, the officers must be sworn to keep the jurors together, and to suffer no person to speak to, or communicate with them on any subject connected with the trial, and not to do so themselves." Additionally, RCr 9.66 requires that a jury deliberating in a felony case be sequestered unless the parties agree otherwise and the court approves. In *Davidson v. Commonwealth*, Ky., 555 S.W.2d 269 (1977), the court noted that sequestering a jury in a felony trial is mandatory. *McIntyre v. Commonwealth*, Ky. App. 671 S.W.2d 775 (1984) provided that RCr 9.66 is clear in its mandate; it is the duty of the trial judge to see that the sequestration rule is complied with unless there is a waiver noted in the record. As noted previously, the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution guarantee the right to an impartial jury. The right to an impartial jury requires that the jury be free from outside influences. *See Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). RCr 9.66, however, has been clarified in *Gabo v Commonwealth*, Ky., 34 S.W.3d 63 (2000). A mere temporary separation of the jury is not grounds for reversal if it appears that no definite prejudice resulted and there was no opportunity to tamper with the jurors. *Id*. at 73 citing 75B, AM Jur.2d Trial, Section 1505 (1992).

Gabo also illustrates the importance of raising the misconduct issue for the first time as soon as it is brought to counsel's attention. In *Gabo*, despite trial counsel's awareness of the suspected misconduct, the issue was raised for the first time in a motion for a new trial. The *Gabo* court determined that any impropriety with respect to the custody of the jury was waived as a result of counsel's untimely challenge. *Id.*

E. Post-trial: Motion for a New Trial

As discussed previously, counsel under RCr 10.02 can, within five days of a verdict, move for a new trial. In conjunction with RCr 13.04, CR 59.01(b) specifically states that juror misconduct may be a ground for such relief. As noted in *Gabo*, however, if counsel knows of the issue but fails to raise it during trial, then it is in essence waived. However, if counsel was not alerted to the matter until after the jury was discharged, or if it was addressed at trial but unsuccessfully litigated, then raising the issue again in a motion for a new trial is certainly proper and helpful in clarifying any issues that were raised without the benefit of lengthy research or further development of material facts. Nevertheless, in *Gordon v. Commonwealth*, Ky., 916 S.W.2d 176 (1995), the court noted that where no challenge is made to a juror's qualification prior to or during trial, and the challenge first occurs after the verdict is rendered, the movant "bears a heavy burden" to present facts which, if proven true, would suffice to undermine the integrity of the verdict. *Id*. at 179.

One case, discussed previously, in which the court did grant relief under such circumstances was *Paenitz, supra*. Another occurred where a juror failed to reveal her employment with the prosecutor. Despite a denial of bias on her part, implied bias was shown by virtue of her relationship. *Randolph v. Commonwealth*, Ky., 716 S.W.2d 253 (1986).

F. RCr 10.04: *See* the discussion in Sections I(a) and I(b), *supra*.

G Interviewing Jurors

A common question is whether defense counsel or his or her agents may interview jurors following their verdict. While there is no statewide prohibition against this in Kentucky, some local rules specify certain procedures or otherwise address this issue in some way. Thus, all local rules should be consulted before doing interviews. Recently, the Supreme Court has considered this subject in an indirect way in the case of *Cape Publications, Inc. D/B/A The Courier Journal v. The Honorable Paul Braden, et al.,* Ky., 39 S.W. 3d 823 (2001). The Court addressed the specific issue of whether a post-trial order prohibiting contact with jurors is an unconstitutional prior restraint on the First Amendment right to speak with jurors and to gather news related to a trial after the trial is completed. *Id.* at 825. The Court stated, AWe must distinguish between contact with jurors by the news media and contact by parties or attornyes who took part in the trial or are involved in the appeal. The media has less incentive to upset a verdict than does a losing party or attorney.@ *Id.* at 826. Plainly contradicting this observation, however, the Court went on to hold that once the trial is completed, and the completion involves any role that the jury might have in regard to post-conviction motions, the circuit court loses authority to restrict any access by or with jurors *of any sort. Id.* at 827. Once the jury is dismissed, the circuit court loses jurisdiction. *Id.* at 828. The post-conviction remedy at the trial level expires upon the filing of a Notice of Appeal. *Id.* Thus, when an appeal is pending, the circuit court lacks authority to control the conduct of jurors *or any other individual* including the public or press, in regard to juror contacts. *Id.* at 827. Once the jury is dismissed, the determination to speak or not to speak is solely on the individual juror. *Id.* at 828.

H. RCr 11.42/CR 60.02 Actions

Once the trial court has disposed of a case, the individual may exercise his/her right to an appeal under Section 115 of the Kentucky Constitution.

If there is juror misconduct that was not addressed in the

trial court relating to a violation of one's constitutional rights such as effective assistance of counsel or prosecutorial misconduct, a movant may seek relief under RCr 11.42. Additionally, CR 60.02(f) — dealing with fraud in the proceedings other than perjured testimony — may be an available avenue in certain instances. This is especially true where juror misconduct could not have been discovered through counsel's due diligence. If there is a question as to counsel's responsibility or ability to challenge this at the time, the litigant may be advised to plead both RCr 11.42 and CR 60.02 actions in the alternative. If the court is reluctant to grant relief on the basis of counsel's alleged deficient performance, the litigant may nonetheless be entitled to some form of relief under CR 60.02.

CONCLUSION

Because of the way it occurs, juror misconduct is not an issue that counsel can fully anticipate. Unlike rules of evidence and procedure that trial counsel face quite often, the issue of juror misconduct may arise only infrequently during a trial lawyer's career. Of paramount importance is understanding that once alerted to it, counsel must decide whether it warrants some curative action by the court such as a mistrial, removal of the juror, curative admonition, or a new trial. A well prepared defense may be destroyed by even one biased and partial fact finder. Jurors who do not follow the judge's instructions and violate their oath by interjecting extrinsic evidence in the proceedings, can render the trial verdict unreliable.

With apologies to Barney Fife, where possible, 'nipping it in the bud' is best. Naturally, courts will try to avoid granting mistrials and use other curative measures. Not only should counsel deal with this issue promptly, she or he must give the court with as much specific factual information as possible. This includes utilizing the right of counsel to seek a hearing even during trial as well as through avowal testimony. As the *Paenitz* and *Randolph* illustrate, juror misconduct can unfairly and seriously undermine the reliability of the verdict and the client's right to a fair and impartial jury. If properly presented and preserved, effective counsel can protect the client's rights.

Suggested Reading

1. Gail Robinson and Kevin McNally, DPA Post-Conviction Manual, Jury Issues in Post-Conviction 17 (1997).
2. John H. Blume, Mark E. Olive & Denise Young, Habeas Assistance and Training Project, Summaries of Successful Jury Misconduct Cases through December 2000.
3. Litigating Juror Misconduct Claims (Equal Justice Initiative of Alabama, 1997).
4. Bennet L. Gershman, Trial Error and Misconduct, 4.5 Jury Misconduct, Lexis Law Publishing, 1997, & 2000 Supplement.
5. John H. Blume, Mark E. Olive & Denise Young, Habeas Assistance and Training Project, Pleading Prejudice in Capital Habeas Corpus Proceedings (2000).
6. Nancy Hollander and Barbara Bergman, The Everytrial Criminal Defense Resource Book, Chapter 2, West Group.
7. Hollander and Bergman, "Dismissal of Jurors," The Champion, July 2000, pp. 34-46.
8. Lillian B. Hardwick, Juror Misconduct: law and litigation, C. Boardman, New York, 1988 (call No. KF 8972.H29 1988)

ENDNOTES

1. Especially in capital cases, counsel would be well-advised to assert the violations of the 8th Amendment of the Federal Constitution and Sec. 17 of the Kentucky Constitution. Death is different. *See, e.g., Cosby v. Commonwealth,* Ky., 776 S.W.2d 367, 369 (1989).
2. *See also Gall v. Parker,* 213 F.3d 265, 332-33 (6th Cir. 2000) (remedy for allegations of juror partiality is a hearing where defendant has the opportunity to prove actual bias; jurors may testify about existence of extrinsic information and improper outside influences); I*n re Beverly Hills Fire Litigation,* 695 F.2d 207 (6th 1984) (juror testimony proper where it concerned the use of extraneous information during jury deliberations), *Stiles v. Lawrie,* 211 F.2d 188, 189(6th Cir. 1954) (juror testimony may be limited to the facts relating to the outside influences that were brought to bear upon the jury, and not their effect on the verdict); *Hicks v. Commonwealth*, Ky., 670 S.W.2d 837, 840 (1984) (RCr 10.04 does not apply to juror testimony about collateral matters) (Liebson, J., and Stephens, J., dissenting), *Durr v. Cook*, 589 F.2d 891 (5th Cir. 1979) (state rule prohibiting a juror from impeaching his own verdict must yield to a defendant's constitutional rights), *Watkins v. State*, 237 Ga. 678, 229 S.E.2d 465 (1976) and *People v. De Lucia,* 20 N.Y.2d, 282 N.Y.S.2d 526, 229 N.E.2d 211 (1967).
3. Notably also, the Kentucky Courts do not uniformly apply RCr 10.04. *See, e.g., Paenitz v. Commonwealth*, Ky., 820 S.W.2d 480 (1991) (accepting juror testimony in post-trial hearing on issue of juror's truthfulness in voir dire).
4. *See* Gail Robinson and Kevin McNally, DPA Post-Conviction Manual, Jury Issues in Post-Conviction 17 (1997).
5. Importantly, under certain circumstances, defense counsel may be ineffective for failing to question jurors thoroughly in voir dire. *See Johnson v. Armontrout,* 961 F.2d 748 (8th Cir. 1992) (death penalty case).
6. *The petitioner had failed to show that the misconduct had a "substantial and injurious effect or influence in determining the jury's verdict."* Id. *at 736-39 (quoting* Brecht v. Abrahamson, *507 U.S. 619, 637 (1993)).*
7. *See also Duchainey v. State,* 736 So.2d 38 (Fla. App. 4th Dist. 1999) (remanding for hearing where jury used a dictionary and thesaurus to define terms relating to defendant's drug-related charges), *State v. Richards, 4*66 S.E.2d 395 (W.Va. 1995) (remanding second degree mur-

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der case for hearing where juror used a dictionary to define "malice," and *Collins v. State*, 701 So.2d 791 (Miss. 1997) (reversing murder conviction and presuming prejudice because the court gave the jury Black's Law Dictionary).

8. In *Smith v. Phillips*, 455 U.S. 209 (1982), a case involving implied juror bias, the Court indicated that an affirmative showing of prejudice was needed to demonstrate juror misconduct, although a *Remmer* hearing was still essential. *Id.* at 217. Though many courts continue to apply a presumption of prejudice, some courts interpret *Smith* as having shifted the burden to the defendant to prove the prejudicial impact of third party contacts, a generally distinguishable type of juror misconduct. Compare *United States v. Smith*, 26 F.3d 739 (7th Cir. 1994) (prejudice presumed where juror was threatened) and *United States v. Frost*, 125 F.3d 346, 377 (6th Cir. 1997) (*Remmer* hearing necessary only where alleged contact presents a likelihood of affecting verdict; defendant has burden of showing that unauthorized contact created actual juror bias). Notably, the United States Supreme Court has stated that there are certain kinds of cases where an intrusion into the jury should be presumptively prejudicial. *See United States v. Olano*, 507 U.S. 725, 739 (1993).

9. In *Olympic Realty Co. v. Kamer*, 283 Ky. 432, 141 S.W.2d 293, 297-28 (1940), the Supreme Court of Kentucky stated the following:

> [T]he right to reject jurors by peremptory challenge is material in its tendency to give the parties assurance of the fairness of a trial [;] the terms of the statutes with reference to peremptory challenges are substantial rather than technical; such rules, as aiding to secure an impartial, or avoid a partial jury, are to be fully enforced; the voir dire [enables] the court to pass upon a juror's qualifications [and assists] counsel in their decision as to peremptory challenge; **the right of challenge includes the incidental right that the information elicited on the voir dire examination shall be true**; the right to challenge implies its fair exercise, and, if a party is misled by erroneous information, the right of rejection is impaired; a verdict is illegal when a peremptory challenge is not exercised by reason of false information; **the question is not whether an improperly established tribunal acted fairly, but it is whether a proper tribunal was established**; if false information prevents a challenge, the right is so disabled and crippled as to lose its essential value and efficacy, as to amount to its deprivation; **the fact that a juror disqualified either on principal cause or to the favor has served on a panel is sufficient ground for setting aside the verdict, without affirmatively showing that fact accounts for the verdict;** it is highly important that the conflicting rights of individuals should be adjudged by jurors as impartial as the lot of humanity will admit; next to securing a fair and impartial trial for parties, it is important that they should feel that they have had such a trial, and anything that tends to impair their belief in this respect must seriously diminish their confidence and that of the public generally in the ability of the state to provide impartial tribunals for dispensing justice between its subjects; **the fact that the false information was unintentional, and that there was no bad faith, does not affect the question, as the harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant**; while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong; that the injury is brought about by falsehood, regardless of its dishonesty, and the effect of the information is misleading, rather than a purpose to give misleading information is the gist of the injury; **when the fact appears that false information was given, and that it was relied upon, the right to a new trial follows as a matter of law.** *Id.* at 297-98 (emphasis added).

10. If a motion is made subsequent to the verdict, the defendant has a heavy burden of alleging facts which, if proven to be true, will suffice to undermine the verdict's integrity. An ambiguous affidavit will not do. *See Gordon v. Commonwealth*, Ky., 916 S.W.2d 176, 179 (1995).

11. Interestingly, the Court did so despite the observation that "We understand the reluctance of an overworked trial court to grant a new trial, which would most likely take another eight days, wherein the question addressed is a close call. For busy trial courts the granting of new trials is akin to self-inflicting a wound." *Id.* at 815.

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PRACTICE CORNER

LITIGATION TIPS & COMMENTS COLLECTED BY MISTY DUGGER

Misty Dugger

Keep An Eye On What The Jury Sees & Hears During Deliberations

Always be sure and check which exhibits are permitted to go to the jury room during jury deliberations. In *Mills v. Commonwealth*, 1999–SC-1146-MR, (Ky., May 24, 2001), 2001 Ky. LEXIS 85, the Kentucky Supreme Court reversed and remanded for a new trial because the jury was permitted to listen to tape-recorded statements of witnesses during deliberations in violation of RCr 9.74. Essentially, RCr 9.74 requires that no information be given to the jury during deliberations except in open court in the presence of the defendant, the entire jury and counsel for the parties. In *Mills*, the interview tapes in question were never played at trial in the presence of Mills and his counsel and were therefore not subject to adversarial testing. The Court found that allowing the jury to hear these tapes in this manner was an error of "serious constitutional magnitude." ~ **Emily Holt**, Appeals Branch, Frankfort

Ineffective Assistance Of Counsel For Failure To Seek Disclosure Of Informant

In *House v. State*, __ S.W.3d __ , No. M1998-00464-SC-R11-PC, (Tenn., May 16, 2001), 2001 WL 523317, 2001 Tenn. LEXIS 419, the Tennessee Supreme Court analyzed whether the petitioner had a right to disclosure of the identity of a confidential informant for the purpose of mounting a claim of ineffective assistance of counsel based upon trial counsel's failure to seek disclosure. The Court held that counsel's performance was deficient and that an *in camera* hearing was the appropriate procedural vehicle for the disclosure of the informant's identity and for the determination of prejudice in the case. ~**Ed Monahan**, Deputy Public Advocate, Frankfort

Always Object To Testimony Of General Criminal Behavior

In *Batten v. State*, 770 So.2d 271 (Fla. App. 2000), the Appellant contended that the trial court erred when it allowed a police officer to testify that is was not unusual for drug suspects to discard marked money during a drug transaction. In reversing, the appellate court stated, "Every defendant has the right to be tried based upon the evidence against him, not on the characteristics or conduct of certain classes of criminals in general ... thus, where an undercover officer's testimony regarding procedures common to other drug sales is admitted as substantive proof of the defendant's guilt, reversible error results". ~ **Richard Hoffman**, Appeals Branch

Inaccurate PSI Report May Harm Clients Required To Attend Sexual Offener Treatment Program

Sexual offender treatment programs often use the PSI as the basis for determining what a client must "admit to" in order to pass the program. Therefore, it is imperative to strike from the PSI all inaccurate information regarding dismissed or acquitted charges. Also strike all information from the victim's statements which is not consistent with the final conviction. The PSI should only contain correct information on the charges in which the defendant currently stands convicted. ~ **Euva Hess**, Appeals Branch, Frankfort

Attorney's Word Not Sufficient Always Provide Testimony, Affidavit Or Other Documentation To Support Motions & Requests For Discovery

In *Stopher v. Commonwealth*, No. 1998-SC-0334-MR (Ky., April 26, 2001), 2001 Ky. LEXIS 66, the Kentucky Supreme Court faulted trial defense counsel for simply telling the trial court that the defense had spoken with someone at the Social Security Administration who told them that a critical witness was receiving SSI benefits for mental incompetency or mental irresponsibility. The defense wanted the trial court to take some action to obtain the records. On the appeal the Supreme Court said:

> "At no time did counsel produce an affidavit documenting specifically who in the public defender's office spoke with the Social Security Administration, and which individual at that agency informed counsel that [the witness] was receiving benefits for mental disability. A bald assertion that 'someone spoke with someone who said...' is not sufficient to warrant an intrusion into a witness' personal medical history... [D]efense counsel failed to produce 'articulable evidence that raise[d] a reasonable inquiry of [the witness'] mental health history.'" The Court cited *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky.1994).

Counsel's word about something may not be enough. Information given the court should be as specific as possible. Also, documentation should be provided to the trial court and placed in the record. Testimony should also be presented at any hearing on the issue, if possible. Concisely, the more complete the record on the issue, the more likely it is to succeed. ~ **Randy Wheeler**, Capital Appeals Branch

Practice Corner needs your tips, too.

If you have a practice tip, courtroom observation, or comment to share with other public defenders, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to **Mdugger@mail.pa.state.ky.us.**

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